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ABSTRACT

This book provides answers to the most common legal questions of Nevada's school board members, administrators, and educators. Chapter 1, "The Nevada School System: Governance, Programs, and Standards," explores the constitutional, legal, and statutory basis of school system governance. Chapter 2, "The Nevada Plan: Finance of Public Education," covers questions about state, local, and federal support, budgeting, bonding, short-term financing, funding, advertising, and taxes. Chapter 3, "Boards of Trustees," considers qualifications, meeting laws, ethics codes, and public recordkeeping. Chapter 4, "Superintendents, Administrators, and Principals," surveys the required qualifications, powers, duties, and roles of administrators and principals. Chapter 5, "Professional Teaching Staff," reviews certification, licensing, probation, rehiring, evaluation, discipline, discharge, and copyright laws pertaining to teachers. Chapter 6, "Statutory Employee Benefits," considers basic questions about required benefits. Chapter 7, "Employee Relations and Collective Bargaining," addresses the formation and practice of employee-management-relations boards, and fair bargaining and labor practices. Chapter 8, "Section 504 of the Rehabilitation Act and the Americans with Disabilities Act," documents compliance requirements. Chapter 9, "Student Rights and Responsibilities," considers the scope of rights established in a wide number of areas. Chapter 10, "Special Education," evaluates the body of law governing eligibility, compliance with the Individuals with Disabilities Education Act, inclusion, due process, and diseases. Chapter 11, "School District Liability," assesses legal exposure from supervision, sexual harassment, and violent students. Chapter 12, "Religion and the Public Schools," probes the permissible role of religion. Chapter 13, "Private Schools and Home Schooling," details legal requirements of both private and home schools, including finances and

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attendance. Chapter 14, "School Buildings, Grounds, Equipment, and Transportation," examines the management of public spaces, equipment, transportation, and public works. (Contains Appendices A-G covering citations, constitutional provisions, rulings, legislation, terms, and Nevada case law, and includes a 10-page index.) (TEJ)

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NEVADA EDUCATION LAW

FEDERAL AND STATE LAW GOVERNING NEVADA K-12 EDUCATION IN QUESTION/ANSWER FORMAT

RICHARD F. DAUGHERTY AND
CHARLES P. COCKERILL

EA 030837

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Nevada Education Law

Federal and State Law
Governing
Nevada K-12 Education

in Question/Answer Format

by

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and
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Dedication and Acknowledgments

I dedicate my contribution to this work to my wife, Bonnie. Her love and patience made this project enjoyable while her word processing and editing skills made it achievable. And to our daughters, Joy, Jill, Joanne, and Erin—each has brought a special quality to our lives.

Richard F. Daugherty

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Charles P. Cockerill

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Preface

The legal knowledge required by Nevada's school board members, administrators, and educators to appropriately govern public schools comes from a myriad of sources. These include decisions from federal and state courts; federal and state statutes, regulations, and codes; federal policy letters; and state attorney general opinions.

Nevada Education Law is offered in an effort to provide, under one cover, answers to the questions most frequently asked by those involved in Nevada education. It is presented in conversational language and includes source citations to facilitate further research. Lengthier explanations are provided when introducing complex topics, particularly those that are frequently misunderstood and have a history of litigation against school districts and their employees.

The material in this book has been carefully researched by the authors and reviewed by selected Nevada school professionals. However, readers are advised to consult local school attorneys regarding particularized legal matters.

Richard F. Daugherty, Ed.D.
Charles P. Cockerill, Esq.

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Chapter 1

The Nevada School System: Governance, Programs, and Standards

1.1 Judicial Jurisdiction Impacting Nevada Schools

How is the federal judicial system organized?

The federal court system consists of U.S. District Courts, U.S. Courts of Appeal, and the U.S. Supreme Court. Nevada is served by one U.S. District Court. School related disputes involving U.S. Constitutional issues or alleged Congressional Act violations (e.g., IDEA) may advance directly from state or school district administrative hearings to federal district courts.

Decisions rendered by the District Court may be appealed to the Ninth Circuit Court of Appeals which sits in San Francisco and has appellate jurisdiction over the nine western states, Guam, and the Northern Mariana Islands. (See map, Appendix A.) Decisions rendered by the Ninth Circuit Court of Appeals, as well as by the Nevada State Supreme Court, may be appealed to the U.S. Supreme Court.

How is the Nevada judicial system organized?

The Nevada court system consists of justices' courts, municipal courts, district courts (which include a family court division), and the Nevada Supreme Court. Justices' courts, adjudicated by elected justices of the peace, meet in over 50 Nevada cities and towns and decide cases involving minor real estate disputes and small-claims. Municipal courts meet in several Nevada cities and handle minor civil disputes and all city ordinance violations. Municipal courts are not "courts of record" therefore appeals from municipal court decisions become new trials in district court. There are no jury trials in municipal courts and are extremely rare in justices' courts.

Matters not under the jurisdiction of the justices' or municipal courts are heard by district courts. The state has nine court districts (e.g., Clark County is the Eighth Judicial District and Washoe County comprises the state's Second Judicial District). District courts hear major criminal cases, contract and real estate cases when claims exceed $7,500, tort cases, civil, and other cases. Both jury trials and bench trials (judge solely determines guilt and sentencing) are allowed in district courts. Of special interest to school personnel is the responsibility of district courts to review decisions of administrative agencies and issue injunctions and subpoenas (for example, to compel witnesses to appear in special education hearings). Family courts are a division of the district courts dealing with domestic matters including the protection of children from abuse and neglect and other issues such as guardianship, child support, and approval of marriages involving minors.

The Nevada Supreme Court is the highest appellate court in the state. A bill passed by the 1997 Nevada legislature increases the number of justices from five to seven (two additional justices will be elected during the 1998 general elections). The Nevada Supreme Court reviews cases on appeal from the Nevada district courts and its decisions may be appealed only to the U.S. Supreme Court.

1.2 Nevada School System Governance

How does the Nevada constitution provide for public education?

Article 11 of the Nevada constitution (1977) deals with education and contains the following sections:

Sec. 1. Legislature to encourage education; appointment, term and duties of superintendent of public instruction.
2. Uniform system of common schools.
3. Pledge of public lands, certain moneys for educational purposes; apportionment of interest and investments of principal.
4. Establishment of state university; control by board of regents.
5. Establishment of normal schools, grade schools; oath of teachers, professors.
6. Support of university, common schools by direct legislative appropriation.

7. Board of regents: Election and duties.
8. Immediate organization, maintenance of state university.
9. Sectarian instruction prohibited in common schools, university.
10. No public funds to be used for sectarian purposes.

Of special importance are Sections 1, 2, 5, and 6 which are reprinted below in their entirety:

> **Section 1.** Legislature to encourage education; appointment, term and duties of superintendent of public instruction. The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.
>
> **Section 2.** Uniform system of common schools. The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.
>
> **Section 5.** Establishment of normal schools, grade schools; oath of teachers, professors. The Legislature shall have power to establis [establish] Normal schools, and such different grades of schools, from the primary department to the University, as in their discretion they may deem necessary, and all Professors in said University, or Teachers in said Schools of whatever grade, shall be required to take and subscribe to the oath as prescribed in Article Fifteenth of this Constitution. No Professor or Teacher who fails to comply with the provisions of any law framed in accordance with the provisions of this Section, shall be entitled to receive any portion of the public monies set apart for school purposes.
>
> **Section 6.** Support of university, common schools by direct legislative appropriation. In addition to other means provided for the support and maintenance of said university and common

> schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

What are statutes governing Nevada public schools?

Statutes are enactments of the legislative branch of government. Federal statutes and rules and regulations promulgated by federal agencies form the basis for school policies and practices, particularly in programs benefiting from federal financial assistance. School districts and school boards exist by authority of state legislatures, therefore the power of state statute is compelling and rarely challenged. The state has considerable latitude in setting its own policies and practices in areas such as teacher certification and curriculum.

Nevada's statutes are published as the Nevada Revised Statutes or "NRS." Nevada laws regarding education are published biennially under the authority of the state superintendent of public instruction and entitled *Nevada Laws on Education*, and it includes the following chapters and sections:

Chapter	385.	State Administrative Organization
	386.	Local Administrative Organization
	387.	Financial Support of School System
	388.	System of Public Instruction
	389.	Courses of Study
	390.	Textbooks
	391.	Personnel
	392.	Pupils
	393.	School Property
	394.	Private Educational Institutions and Establishments
	395.	Education of Persons With Disabilities
	396.	University and Community College System of Nevada
	397.	Western Regional Higher Education Compact
	398.	Intercollegiate Athletics
	399.	Interstate Compact for Education
Related Chapters	288.	Relations Between Governments and Public Employees
	332.	Purchasing: Local Governments
	354.	Local Financial Administration

Related	49.290	Counselor and pupil
Sections	49.291	Teacher and pupil

What is the composition of the state board of education and what are its major duties?

The Nevada legislature created the state department of education which includes the superintendent of public instruction and the state board of education. The state is divided into three districts from which the eleven-member board is elected to four-year terms (NRS 385.021). No member can be elected to office more than three times. Two of the members are elected from district 1, which consists of most of Washoe County (including Reno); seven of the members are elected from district 2, which consists of Clark County (Las Vegas), Lincoln County and parts of Nye County; and two members from district 3, which comprises the remainder of the state. The board elects one of its own members as president after each election, and the state superintendent of public instruction serves as secretary of the board and calls all regular meetings (NRS 385.030). All public school textbooks must be approved by the state board of education (NRS 390.140(1); 385.240).

The state board also has the power to suspend or revoke the license of any teacher, administrator or other licensed employee upon the recommendation of the state superintendent of public instruction or by the board of trustees of any of the school districts. The licensee must be given a statement of the charge(s), a copy of the recommendation received by the state board and notice that the licensee may request a hearing (NRS 391.322).

Nevada statutes require the state board to prescribe and enforce courses of study and high school graduation requirements for the public schools (NRS 385.110), and adopt standards for approval of teacher and school administrator education programs (NRS 385.080). The state board may also veto regulations adopted by the Commission on Professional Standards in Education under certain circumstances.

What is the method of appointment, term of office and the major duties of the superintendent of public instruction?

The superintendent of public instruction is appointed by the state board of education for a term of three years (NRS 385.150). One of the most important functions of the state superintendent is the issuance of teacher licenses (NRS 391.033). NRS 385.175 lists several other general duties performed by the state superintendent of public instruction:

1. Execute, direct or supervise all administrative, technical and procedural activities of the department in accordance with policies prescribed by the state board.
2. Employ personnel for the positions approved by the state board and necessary for the efficient operation of the department.
3. Organize the department in a manner which will assure efficient operation and service.
4. Maintain liaison and coordinate activities with other state agencies performing educational functions.
5. Perform such other duties as are prescribed by law.

NRS 385.180 and 385.190 cite additional duties which must be accomplished by the state superintendent of public instruction or his or her designee. These include annual visits to each county in the state and consultation with school officers in Nevada and other states on topics of school administration, school methods and school law. The state superintendent is responsible for convening teacher and administrator conferences as he or she deems advisable, and must make biennial reports to the governor and prepare the "pamphlet copies of the school law" which has become the *Nevada Laws on Education* (Title 34).

What are the duties of the deputy superintendents?

Nevada statute (NRS Chapter 385) allows the superintendent of public instruction to appoint two deputy superintendents. The deputy superintendent of instructional, research, and evaluative services deals mainly with staff evaluation and supervision and curriculum development.

The deputy superintendent for administrative and fiscal services is required to perform the following duties:

1. Determine the apportionment of all state school money to schools of the state as prescribed by law.
2. Develop for public schools of the state a uniform system of budgeting and accounting, which system, when approved by the state board is mandatory for all public schools in the state, and must be enforced as provided for in subsection 2 of NRS 385.315.
3. Carry on a continuing study of school finance in the state, particularly the method by which schools are financed on the state level, and make such recommendations to the superintendent of public instruction for submission to the state board as he deems advisable.

4. Recommend to the superintendent of public instruction for submission to the state board such changes in budgetary and financial procedures as his studies may show to be advisable.
5. Perform such other statistical and financial duties pertaining to the administration and finances of the schools of the state as may be required by the superintendent of public instruction.
6. Prepare for the superintendent the biennial budgets of the department for consideration by the state board and submission to the governor.

NRS 385.310

The deputy superintendent for administrative and fiscal services is also responsible for inspecting fiscal records and accounts related to school district revenues and expenditures (NRS 385.315).

What is the role and composition of the Commission on Professional Standards in Education?

While the state superintendent of public instruction is charged with issuing teacher licenses and the state board of education is empowered to suspend or revoke licenses, it is the Commission on Professional Standards in Education (the "Standards Commission") that is responsible for prescribing the actual qualifications, rules and standards for Nevada teacher licensure. The standards, regulations and procedures established by the Commission on Professional Standards in Education are published in the Nevada Administrative Code (NAC).

The Commission consists of nine members appointed by the governor and must include classroom teachers (one each from an elementary, middle, secondary and special education assignment), one school district counselor or psychologist, two school administrators (at least one must be a principal), one dean of the College of Education (or their designee) from UNR or UNLV (rotational) and one member representing the general public (NRS 391.011). The law further stipulates that one member of the commission who is a teacher, administrator, counselor, or psychologist must be employed by a licensed private school.

How are Nevada school district boundaries established?

Nevada school districts are patterned after county boundaries. The Carson City school district has been declared by the legislature to be considered a county school district (NRS 386.010). It can therefore be said that Nevada school district boundaries coincide with county boundaries. The 17 school districts range from very small (a few hundred students) to the Clark County school district which enrolls more than 60% of the state's student population.

How is the number of local school board members determined?

Nevada school boards consist of either five or seven board members (called trustees) based on the district's enrollment and are elected by district residents. If a school district has an enrollment of less than 1,000 students, the number of board members is five. If the district enrolls more than 1,500 students, the number of board members is seven. Districts with enrollments between 1,000 and 1,500 students have seven board members but may opt for only five with the successful passage of a board resolution (NRS 386.120).

What is the length of school board members terms of office and how are they elected?

Board trustees serve four year terms and are elected on even numbered years. Method of election is dependent upon the schools student enrollment (NRS 386.120-200). See Chapter 3 of this text which deals with boards of school trustees in detail.

1.3 Nevada School Programs and Standards

What are the general requirements for courses of study in Nevada schools?

Required courses of study are set forth in NRS Chapter 389 and currently include the following:

1. American government (including instruction regarding violent crimes);
2. American and Nevada history;
3. Patriotic exercises;
4. Citizenship and physical training;
5. Physiology, hygiene, and cardiopulmonary resuscitation;
6. Prevention of suicide;
7. AIDS, human reproduction, and communicable diseases;
8. Child abuse;

9. American free enterprise system;
10. American sign language;
11. Automobile driver education;
12. Environmental education;
13. Technology;
14. Occupational guidance and counseling; and
15. Adult roles and responsibilities.

The reader is advised that the list of required courses is revised by the legislature and affected by regulations in the Nevada Administrative Code. The NRS, NAC, and Nevada Department of Education should be consulted for current requirements regarding courses of study.

How many days of school are required per year?

The state legislature requires a minimum of 180 days of school per year with the provision for scheduling equivalent amounts of educational time using alternative delivery methods, such as year-round schooling. School districts are to include at least three "contingent" days to be used in case of inclement weather, natural disaster or an accident that necessitates the closing of the majority of the facilities within a district. If more than three days are lost in a school year due to any of the above reasons, the district may appeal to the state superintendent of public instruction to have the additional days missed counted as school days in session (NRS 388.090).

For specific "unit of credit" and K-12 curriculum requirements, see chapters 389.011-390.140 of the Nevada Administrative Code.

Are Nevada children required to attend kindergarten?

As of July 1, 1999, the completion of kindergarten will be a prerequisite for admission to first grade. Certain exceptions will be available, including an assessment determining that a pupil is developmentally prepared to enter first grade without having completed kindergarten (NRS 388 & 392, Amended by AB 6, 1997).

What is the status of Nevada's Class Size Reduction plan?

In 1989 the Nevada legislature passed a measure designed to reduce the teacher-pupil ratio in kindergarten through third grade. Rationale for the legislation is excerpted as follows:

> WHEREAS, A successful educational system in Nevada will directly affect the future of this state; and
>
> WHEREAS, It is clear that the ratio of pupils to teachers in a classroom where core curriculum is taught, particularly in the earliest grades, is one of the most determinative factors in the quality of education received; and
>
> WHEREAS, The intended goal of this legislature is to achieve a pupil-teacher ratio of no more than 15 pupils per teacher or 30 pupils per 2 teachers in a classroom where core curriculum is taught . . .
>
> NRS 388.700, Reviser's Notes

In 1996 nearly 56 million dollars was appropriated to achieve 16 to 1 ratios in at-risk kindergartens and first and second grades. The increased funding level was also intended to begin reducing teacher-pupil ratios in the third grade. The 1997 legislature continued funding for this program. Language in the 1997 appropriations bill noted that in extending the program to grade three students, where lowering student-to-teacher ratios are not reasonable or practicable, districts have the discretion to use "alternative methods of reducing the ratio." One alternative method mentioned in the bill was the provision of increased remedial instruction (NRS Chapter 388, Amended by SB 576, 1995; AB 659, 1997).

What student testing is mandated in Nevada?

All Nevada school districts are required to administer state proficiency/basic skills examinations prior to the completion of the fourth, eighth, tenth, and eleventh grades. Those failing at the fourth and eighth grade level may be passed to the next grade, but "the results of his examination must be evaluated to determine what remedial study is appropriate." Students failing the eleventh grade examination must pass it before a diploma will be awarded. However, students who have reached the age of seventeen, may be given a certificate of attendance "in place of a diploma" (NRS 389.015). Students with identified learning disabilities may be exempt from such examinations depending upon their individualized educational program.

Amendments to the Individuals with Disabilities Education Act (IDEA) require that children with disabilities, with accommodations where necessary, be included in state and district wide assessment programs by

1998. Alternative assessments must be developed for children who cannot participate in regular assessments (IDEA Reauthorization Amendments, 1997).

Does Nevada law provide a substitution for completing a high school education?

The 1997 Nevada legislature added a law that formally recognized tests of general educational development which "enable persons who have not graduated from high school to demonstrate that they have achieved an educational level which is an acceptable substitute for completing a high school education." To qualify for such testing a student must be at least 16 but less than 18 years of age, not currently enrolled in high school, and have written permission signed by parent or guardian (AB 376, 1997 amending NRS Chapter 392).

What is Nevada's law regarding retaining or "holding back" a student?

Nevada law regarding student retention is as follows:

1. Before any pupil enrolled in a public school may be retained in the same grade rather than promoted to the next higher grade for the succeeding school year, the pupil's teacher and principal must make a reasonable effort to arrange a meeting and to meet with his parents or guardian to discuss the reasons and circumstances.
2. The teacher and the principal in joint agreement have the final authority to retain a pupil in the same grade for the succeeding school year.
3. No pupil may be retained more than one time in the same grade.

NRS 392.125

What are the requirements of Nevada's compulsory attendance law?

Chapter 392 of the Nevada Revised Statutes mandates that children between the ages of seven and seventeen attend the public school in the district in which they reside for the school's entire session. This requirement has exceptions introduced by the attorney general and by subsequent amendments to the statute. The state attorney general has opined that:

- Local school district trustees have the authority to "excuse" children under this statute.

- School districts, upon written parental request, may excuse students from school for a brief period of time to attend church. However, it is not mandatory on the part of school authorities to approve such requests.
- Regular released time from public school attendance for purposes of religious instruction is not authorized by Nevada laws.
- Attendance at private schools may constitute "sufficient attendance" under state compulsory attendance law.

Additional exceptions to compulsory attendance include the following:

- Children whose physical or mental condition prevents attendance.
- Children who receive equivalent instruction at home or in another school. (This must be evidenced in writing and approved by the local school district's board of trustees.)
- Children whose residence is such a distance from the nearest public school that attendance is impractical or unsafe. (Such determination is made by the superintendent of public instruction.)
- A child who has completed the eighth grade and has been permitted to leave school by the juvenile or family division of the district court.

For more detail regarding exemptions for private or home schooling, see Chapter 13 of this text, NRS 392.070, and Nevada Administrative Code (NAC) 392.015-075.

How is "truancy" and "habitual truancy" defined and what procedures are mandated?

Nevada school boards are required to create advisory boards to review school attendance. Building principals are required to report to law enforcement agencies names of students who are habitual truants. A habitual truant is defined as a student who has accumulated three or more unexcused absences from school. Written complaints regarding student truancy may be made by any school officer or taxpayer. The law enforcement agency conducts an investigation and if a student is confirmed to be a habitual truant, a misdemeanor citation is prepared ordering the truant to appear in juvenile court.

If the court determines the child is a habitual truant in need of supervision, s/he may be required to pay a fine of up to $100, and may be subject to a 30-day driver's license suspension. The court may suspend the fine if the child attends school for 60 consecutive school days. If the court makes a second or subsequent determination that the child is a habitual truant in need of supervision, the fine increases to no more than $200 with a mandatory driver's license suspension of 60 days. Up to 10 hours of community service may also be imposed. The bill provides a mechanism for the reinstatement of a driver's license that has been suspended under this act. Continued truancy may result in the filing of criminal charges against the parent(s)/guardian(s).

The 1997 truancy law heightens notification requirements by parents for pupil absences and requires school officials to notify parents or guardians in writing of unapproved absences and the consequences of truancy. The law requires the State Department of Education to create and maintain an annual record of pupil attendance and truancy rates for each public school.
NRS Chapters 385 & 392 (amended by AB 486, 1997)

What are Nevada's student immunization requirements?

Nevada statute states that:

> Unless excused because of religious belief or medical condition, a child may not be enrolled in a public school within this state unless his parents or guardian submit to the board of trustees of the school district in which the child resides a certificate stating that the child has been immunized and has received proper boosters for that immunization or is complying with the schedules established by regulation . . . for the following diseases:
> (a) Diphtheria;
> (b) Tetanus;
> (c) Pertussis if the child is under 6 years of age;
> (d) Poliomyelitis;
> (e) Rubella;
> (f) Rubeola; and
> (g) Such other diseases as the local board of health or the state board of health may determine.

NRS 392.435(1)

The certificate must show that the required vaccines and boosters were given and must be signed by a licensed physician or registered nurse or the designee of either. The law further states that

> A child may enter school conditionally if the parent or guardian submits a certificate from a physician or local health officer that the child is receiving the required immunizations. If a certificate from the physician or local health officer showing that the child has been fully immunized is not submitted to the appropriate school officers within 90 school days after the child was conditionally admitted, the child must be excluded from school and may not be readmitted until the requirements for immunization have been met.
>
> NRS 392.435(4)

Certificates of immunization must be included in the pupil's academic or cumulative record and transferred as part of that record upon request.

For what reasons may students be exempted from Nevada's immunization requirements?

Children may be exempted from immunization if contrary to their religious belief. Parents or guardian are required to submit a written statement to the board of trustees indicating that their religious belief prohibits immunization.

If the medical condition of a child will not permit him or her to be immunized, that student may be exempted. The parents or guardian must provide a written statement to the board of trustees attesting to the child's medical condition signed by a licensed physician.

Whenever the state of board of health or a local board of health determines that there is a dangerous contagious disease in a public school attended by a child for whom exemption from immunization has been granted, the board of trustees of the school district "shall require" that either the child be immunized or that he or she remain outside the school environment (NRS 392.437-446).

Is there a law against creating disturbances or using abusive or threatening language at public schools?

Yes. NRS 392.480 refers to disturbances of the peace of public schools and the use of threatening or assaultive language with pupils or school employees. It states:

1. It is unlawful for any person to disturb the peace of any public school by using vile or indecent language within the building or

> grounds of the school. Any person who violates any of the provisions of this subsection is guilty of a misdemeanor.
>
> 2. It is unlawful for any person to threaten or assault any pupil or school employee
>   (a) Within the building or grounds of the school;
>   (b) On a bus, van or any other motor vehicle owned, leased or chartered by a school district to transport pupils or school employees; or
>   (c) At a location where the pupil or school employee is involved in an activity sponsored by a public school.
>
>   . . .[A]ny person who violates any of the provisions of this subsection is guilty of a misdemeanor.
> 3. It is unlawful for any person maliciously and purposely in any manner to interfere with or disturb any persons peaceably assembled within a building of a public school for school district purposes. Any person who violates any of the provisions of this subsection is guilty of a misdemeanor.
> 4. For the purposes of this section "school employee" means any licensed or unlicensed person employed by a board of trustees of a school district . . .

What is the status of charter schools in Nevada?

The 1997 Nevada legislature enacted new law authorizing the formation of charter schools and authorizing district school boards to sponsor charter schools. The law prescribes the process by which applications to form charter schools are submitted and approved and exempts charter schools from certain statutes applicable to public schools. It is important to note that "charter schools" in Nevada are defined as public schools as the statute allows only county school districts to sponsor charter schools (NRS 385.007).

Charter schools are prohibited from discriminating based upon race, gender, religion, ethnicity, or disability. However, schools may be formed to serve students with disabilities, to provide a juvenile discipline program for a single gender, or to serve at-risk students.

Charter schools are subject to the same accountability provisions that apply to other public schools, including achievement and proficiency examination reporting. They are also subject to the same collective bargaining, health, and safety provisions that apply to traditional public schools. The steps involved in forming a charter school as summarized by the Legislative Council Bureau are as follows:

1. A school district board of trustees submits an application for authorization to sponsor charter schools to the State Department of Education.
2. The State Department of Education reviews the application and grants authority for the school district board of trustees to sponsor charter schools.
3. The committee to form a charter school submits an application to operate a charter school to the State Department of Education.
4. The State Department of Education reviews the application and approves or denies it. If denied, the committee has 30 days to correct deficiencies found and resubmit the application.
5. The committee to form a charter school submits the application to operate a charter school to the school district board of trustees.
6. The school district board of trustees reviews the application and approves or denies it. If denied, the committee has 30 days to correct deficiencies found and resubmit the application.
7. The school district board of trustees and committee to form a charter school, upon approval of the application, enter into a written agreement concerning the authority and duty of the sponsor to monitor the progress of the charter school.
8. The school district board of trustees grants a written charter to the committee and becomes the school's sponsor. The committee becomes the governing body of the charter school.
9. The charter school governing body begins accepting applications for enrollment in the charter school.
10. The school district board of trustees monitors and evaluates the school's progress and reports annually to the State Board of Education.

Adapted from materials prepared by the Legislative Counsel Bureau, Research Division, August 1997. For more information regarding charter schools, the reader may refer to NRS Chapter 385 (as amended by SB 220, 1997).

What is Nevada doing to improve school accountability?

In 1997, the Nevada legislature adopted the Nevada Education Reform Act. The Act was designed to strengthen and expand the school accountability program, establish a system for the adoption of statewide standards in academic subjects, implement a process for a series of statewide tests linked to those standards, provide for the implementation of educational technology in the public schools, and provide for the legislative review of education reform. The legislature appropriated over $40 million for implementation of this Act, with nearly all of the amount earmarked for computer hardware, software, and training.

The Act provided for the establishment of a system to evaluate the performance of public schools through criteria that classifies schools into one of three categories: schools demonstrating high achievement; those showing adequate achievement; and those demonstrating inadequate achievement. The criteria for such placement includes academic achievement based upon average test scores as well as student and teacher attendance rates. Schools that need improvement advance through three phases. The first year a school is identified as demonstrating inadequate achievement, the school district is required to establish a school improvement plan. Remediation programs that have been demonstrated to improve pupil achievement must be adopted. If the school is again designated as demonstrating inadequate achievement, it is placed upon academic probation and the State Department of Education must adopt an improvement plan and appoint a panel to evaluate the school. The appointment of a panel may be waived if a school continues to show significant improvement. If the school is ranked for a third year as demonstrating inadequate achievement, the panel may recommend the Superintendent of Public Instruction appoint a new administrator for the school.

The measure requires that additional accountability data be collected, including the presence of computer technology; incidents at school involving alcohol or controlled substances; and parental participation, among others. High schools must report the percentage of its graduates requiring remedial course work within institutions of the University and Community College System of Nevada (UCCSN). A new tenth grade norm-referenced test is added to the accountability provisions, and districts must report the results of the science component of proficiency examinations.

For more detail on the Nevada Education Reform Act see Chapter 385 of the Nevada Revised Statutes.

Adapted from the Bill Summary, Senate Bill 482, prepared by the Legislative Counsel Bureau, Research Division, 1997.

Chapter 2

The Nevada Plan: Finance of Public Education

In Nevada, public education is financed by a mix of state, local and federal funds.

2.1 State Support

What is the Nevada Plan for financing public education?

The Nevada Plan is the means used to finance elementary and secondary education in Nevada's public schools. The process involves the state developing a guaranteed level of funding for the 17 Nevada school districts. The revenue for the guaranteed funding is derived from state and local sources. Funding for the local school districts consists of state support received through the Distributive School Account and locally collected revenues from the 1.5 cent Local School Support Tax (sales tax) and the 25 cent Ad Valorem Tax (property tax).

State financial aid equals the school district's basic support guarantee minus local available funds produced by mandatory taxes (NRS 387.121). This formula is designated the "Nevada Plan." State funding for education is the amount allocated from the state distributive school account (DSA).

In order to determine the level of funding for the local school districts, a Basic per Pupil Support Rate is established. This rate is determined by a formula that considers the demographic characteristics of the local district. In addition, the districts' transportation costs are included as is a wealth adjustment, based on the district's ability to generate revenues in addition to the guaranteed funding.

State support for public education is based on total weighted enrollment as of the "count day," i.e., the "last day of the first school month of the school year" (NRS 387.1233). In determining total "weighted" enrollment, all students grade 1-12 are weighted one per pupil and six-tenths per pupil for those enrolled in kindergarten and in preschool special education programs for children under five years of age (NRS 387.1233(1)(a)(1)(2)). This number is multiplied by the per pupil basic support which is fixed by the Nevada legislature and fluctuates from district to district (NRS 387.1233(1)(a)). To this number is added state special education support.

From the basic support guarantee is subtracted the local school support (sales) tax and one-third ($.25/$100 assessed valuation) of the ad valorem (property) tax (NRS 387.195).

State support is calculated using the following hypothetical school district:

6000	Total weighted enrollment
0	+ adult education (one-fourth enrollment)
x $4500	Per pupil basic support
$27,000,000	Guaranteed Basic Support
+ $830,820	Special education support (30 units x $27,694/unit)
$27,830,820	Total Guaranteed Support
($11,000,000)	Local school support (see 2.2 below)
$16,830,820	State Responsibility

Is there any restriction on the use of money for public schools?

Yes. No portion of public school funds or money specially appropriated for the purpose of public schools may be devoted to any other object or purpose or used for the benefit of any sectarian or secular society or association (NRS 387.045).

What are the authorized uses of money in the county school district fund?

Money on deposit in the county school district fund (*) must be used for:

(a) Maintenance and operation of public schools.
(b) Payment of premiums for Nevada industrial insurance.
(c) Rent of schoolhouses.
(d) Construction, furnishing or rental of teacherages, when approved by the superintendent of public instruction.
(e) Transportation of pupils, including the purchase of new buses.
(f) Programs of nutrition.
(g) Membership fees, dues and contributions to an interscholastic activities association (NRS 387.205).

(*) Districts with their own accounts do not have a county school district fund.

Additionally, where an account has been established under NRS 354.603 the money may be used for:

(a) Purchase of sites for school facilities.
(b) Purchase of buildings for school use.
(c) Repair and construction of buildings for school use.

What is the source of funding the Distributive School Account (DSA)?

The DSA is financed by legislative appropriations from the State's general fund and other revenues, including a 1.5 cent out of state sales tax, a slot machine tax, and mineral land lease income and interest from investments of the Permanent School Fund.

Are pupils enrolled in "charter schools" included in the "count" of pupils in the school district?

Yes. Pupils who are enrolled in a charter school, including pupils enrolled in programs of special education in a charter school, must be included in the count of pupils in the school district for the purposes of apportionments and allowances from the state distributive school account (Senate Bill 220 § 24 (1997)).

Are all Nevada school districts provided the same "per pupil" basic support guarantee?

No. For the 1997-98 fiscal year the estimated weighted average is $3,698 per pupil, however the actual basic support guarantee is as follows:

Carson City	$4,052
Churchill County	4,390
Clark County	3,554
Douglas County	3,931
Elko County	4,339
Esmeralda County	7,261
Eureka County	100
Humboldt County	4,278
Lander County	4,316
Lincoln County	6,511
Lyon County	4,656
Mineral County	4,550
Nye County	4,594
Pershing County	4,856
Storey County	5,209
Washoe County	3,533
White Pine County	4,869

The basic support guarantee for the 1998-99 fiscal year is an estimated weighted average of $3,812 per pupil with the estimate basic support guarantee (with estimated ad valorem adjustment):

Carson City	$4,210
Churchill County	4,576
Clark County	3,646
Douglas County	4,094
Elko County	4,501
Esmeralda County	7,181
Eureka County	100
Humboldt County	4,512
Lander County	4,569
Lincoln County	6,928
Lyon County	4,827
Mineral County	4,867
Nye County	4,834
Pershing County	5,093

Storey County	5,518
Washoe County	3,645
White Pine County	5,009

The above are estimates for FY 1998-99 and actual numbers will be provided prior to the 1998-99 fiscal year (Senate Bill 487, §§ 1 & 4 (1997)).

What if a school district experiences decreases or increases in enrollment?

In order to protect districts from decreases in enrollment, the district is "held harmless" with the guaranteed level of funding based on the prior year's weighted enrollment (NRS 387.1233(2)). Conversely if a district grows by more than 3% but less than 6% after the first school month, a growth increment of an additional 2% is added to the guaranteed level of funding. If a district grows by more than 6% the growth increment is 4% (NRS 387.1243).

Is there provision for emergency financial assistance for Nevada school districts?

Yes. Where a local school district's actual receipts from all sources provided by NRS Chapter 374 and 387 are:

> less than the total estimated receipts from these sources in the final approved budget for the fiscal year, and which cannot therefore provide a minimum program of education and meet its contract obligations, may apply for emergency financial assistance from the state distributive school account in the state general fund.
>
> NRS 387.1245

How is special education funded?

Special education is funded on a per "unit" basis, with the amount per unit established by the legislature (NRS 387.1221). The basic support for each special education unit is $27,694 for the 1997-98 fiscal year and $28,248 for the 1998-99 fiscal year. A "unit" includes the full-time services of licensed personnel providing a program of instruction in accordance with minimum standards prescribe by the State Board of Education. The special education funding is in addition to the Basic per Pupil Support Rate (NRS 387.1211(3)).

2.2 Local Support

What are the components of local support for public education?

Local revenues for Nevada school districts include:

a. Ad valorem (property tax) - $.75/$100 of assessed valuation (NRS 387.195);
b. Sales tax - 2.25% of the state-wide general sales tax levy (NRS 374.110);
c. Motor vehicle privilege (registration) tax (NRS 387.328; NRS 482.181);
d. Interest income (on General Fund cash flow);
e. Other miscellaneous income including percentage of local gas/electric franchise, interfund transfers and the sales of surplus property and tangible goods.

An illustration of local support contained in the above hypothetical school district (see section 2.1) is as follows:

$3,000,000	Ad valorem (property) tax
$6,000,000	Sales tax
$1,000,000	Motor Vehicle Privilege Tax
$ 200,000	Interest income
$ 800,000	Other income/franchise tax
$11,000,000	Total local support (subtracted from total basic support)

2.3 Federal Support

What federal support is provided for local school districts?

Acceptance and disbursement of federal money is regulated by NRS 387.050 (occupational education), 387.067 (elementary and secondary education), and 387.075 (nutrition). While federal funding makes up only approximately 6% of the state educational resources, it is a significant component of the overall financial support of public education in Nevada. A partial list of federal programs include:

1. Improve America's Schools Act (IASA), Title I - Disadvantaged, migrant, program improvement, neglected and delinquent, Even Start;
2. Title II - Eisenhower, professional development;
3. Title IV - Drug free schools;
4. Title VI - Innovative programs;
5. Individuals with Disabilities Act (IDEA) - Special education;
6. Carl Perkins occupational education;
7. Nutrition education programs;
8. Adult basic education;
9. Job Training Partnership Act (JTPA);
10. Goals 2000;
11. Technology literacy challenge grant; and
12. Bilingual education.

2.4 Local Government Finance

What is the budget process used by Nevada school districts?

All Nevada school districts utilize the July 1 through June 30 fiscal year for preparing their annual budgets. The state of Nevada Department of Taxation issues its revenue projections in February of each year to assist local governments in forecasting revenues for the succeeding fiscal year. Local government financial administration for school districts is governed by NRS Chapter 354. School districts conduct internal and public hearings in order to assess and set priorities in the budget document.

2.5 Tentative/Final Budgets

When is a school district required to submit its tentative and final budgets?

The local school district is required to submit its tentative budget to the Department of Taxation on or before April 15th (NRS 354.596). Public budget hearings for school districts are required to be held on the third Wednesday in May. Final budgets for school districts must be adopted on or before June 8th (NRS 354.598).

Final budgets must contain budgeted revenues and expenditures. The actual unreserved prior year ending fund balance becomes the opening balance for the succeeding fiscal year.

What is contained in the final budget?

The final budget contains a forecast of revenues, expenditures, and fund balances for the school district's general fund and other funds; for example, the food service fund, state and federal grants, adult education, gifts and donations, special education, class size reductions, capital projects, building and sites, insurance, and unemployment funds. The final budget contains the actual prior year, estimated current year, and budgeted next year expenditures.

Is there any additional report required to be filed with the final budget?

Yes. Each school district must prepare and include with its final budget a separate, written report summarizing the effectiveness of the district's program of accountability during the school year (Senate Bill 482 § 18 (1997)).

Can a school district establish internal service and other funds to address particular funding issues?

Yes. Typical funds established by school districts include internal service funds (NRS 354.612) and special ad valorem capital projects fund (NRS 354.613) for funding capital building projects.

Do insurance funds receive any special protection?

Yes. Funds established to provide for liability and group insurance for the district and employees and the reserves for these funds are protected from collective bargaining and may only be expended for the limited purpose of the fund (NRS 354.6215).

How are mid-year adjustments made for increased revenues and expenditures?

School districts are required to augment their budgets to reflect increased revenues and unbudgeted expenditures. Formal augmentation usually is scheduled following completion of the annual external audit which fixes the prior year ending fund balance which becomes the current year beginning fund balance (NRS 354.615).

Other reasons for augmenting the budget include:

a. Basic support becomes known in legislative year after final budget filed with the Nevada Department of Taxation,
b. Apportionment enrollment is determined, and
c. Changes in negotiated collective bargaining agreements.

Can a school district budget contingency monies for unanticipated expenses?

Yes. School districts may budget a contingency account of up to 3% of total budgeted expenditures for unanticipated expenditures or anticipated expenditures of an uncertain amount (NRS 354.608).

What is the function of a reserved/unreserved ending fund balance?

Unappropriated revenues and resources accrue or are budgeted into the school district's reserved and unreserved ending fund balance. Reserved fund balances are for prior year encumbrances and prepaid expenses, etc., which are not paid until the succeeding fiscal year, e.g., purchases of computer equipment in May that does not arrive until the following September.

Is the unreserved ending fund balance protected from labor negotiations?

Yes. A budgeted unreserved ending fund balance of up to 8.3% of total budgeted expenditures (less capital outlay) is unavailable for collective bargaining (NAC 354.660). The purpose of the unreserved ending fund balance is to provide cash flow for the beginning of the succeeding fiscal year. The 8.3% figure is 1/12th or one month's expenditures. This cash flow is critical for Nevada school districts since the first installment of property taxes is not due until August with distribution delayed until late September.

A 1995 amendment to NRS 288.200(7)(a) indicates, however, that the preliminary determination of current ability to pay may include amounts in certain budgeted fund balances where the local governments' external auditor determines that the "reserve in any fund set forth in paragraph (c) of subsection 4 of NRS 354.624 exceeds the amount that is reasonable and necessary to carry out the purposes for which the fund was created" (NRS 354.6241).

Can Nevada school districts submit an unbalanced budget or expend funds in excess of its approved budget?

No. Nevada school districts are required to submit balanced budgets and any expenditure in excess of amounts appropriated in the final budget is unlawful (NRS 354.626).

How often is a school district required to obtain an external audit of its budget?

As with all Nevada local governments, school districts are required to obtain an annual external audit by an independent accounting firm (NRS 354.624).

2.6 Bonding and Short-Term Financing Options

County school districts may issue general obligation bonds for the constructions of new buildings, enlarging or repairing existing buildings, acquiring sites for building schools or additional real property and purchasing furniture and equipment (NRS 387.335). The borrowing maximum is capped at 15 percent of the county's total assessed valuation.

How can Nevada school districts finance capital building projects?

For small capital projects medium-term financing is available with the approval of the Executive Director of the Department of Taxation (NRS 354.430). Such financing is usually obtained through a local bank and must be paid back within a maximum of ten years. No vote of the people (taxpayers) is required for medium-term financing. The medium-term financing must be noticed and approved by the school district board of school trustees prior to transmittal to the Department of Taxation.

For larger projects local school districts may sell long term bonds that may be paid back in more than 10 years. Bond issues must be approved by the local General Obligation Bond Commission and the county governing board. Bonds are normally paid off with an increase in the ad valorem (property) tax rate which requires a simple majority vote of the people in a special or regular election (NRS Chapter 350).

Are there special funds for Capital Projects?

Yes. NRS 387.328 allows local school districts to establish a fund for capital projects. The money in such fund may accumulate for capital projects for a period not to exceed 20 years.

The 1997 Nevada legislature provided an additional source of funding capital projects. The tax on the rental of transient housing is imposed at the rate of 2 percent in counties whose population is 400,000 or more and 1 percent in counties whose population is less than 400,000 (Assembly Bill 353 § 11 (1997)).

How are school district bonds retired?

Bonds approved by the voters are retired by a tax levied on real property for the payment of interest and redemption of bonds of the county school district. Once the bonds are paid off the additional tax levied is removed from the tax roll.

2.7 Funding for Class-Size Reduction

How is class-size reduction funded?

The Nevada legislature has created a trust fund for class-size reduction to accomplish the mandate of a ratio of 15 pupils to 1 licensed teacher for kindergarten and grades 1-3 in classes where core curriculum is taught (NRS 388.730). In 1997, the Nevada legislature established the following goal for reducing pupil-teacher ratios in kindergarten and grades 1-3 to no more than 15 pupils per class; grades 4-6 to no more than 22 per class; grades 7-12 to no more than 25 pupils per class (Assembly Bill 659, preamble (1997)).

The class-size reduction funding allows for 15:1 ratio in grades 1 and 2; 19:1 in grade 3 in fiscal year 1998-99; and continued support for kindergarten class-size reduction.

2.8 Revenues from Advertising on Public School Buses

How are revenues from bus advertisements used?

The 1997 Nevada legislature allowed school districts to sell advertising space on public school buses. Any revenues generated from such advertising must be used to fund schools within individual school districts giving preference to schools determined as serving a significant proportion of pupils who are economically disadvantaged (Assembly Bill 146 (1997)).

2.9 Residential Construction Tax

What is residential construction tax and how is it imposed?

A school district whose population is less than 40,000 may request that its Board of County Commissioners impose a tax on residential construction in an amount not exceeding $1,600 for each mobile home lot, residential dwelling unit, or suite in an apartment complex (NRS 387.331).

Chapter 3

Boards of School Trustees

3.1 Qualifications and Elections

How is the number of board members determined?

Nevada school boards consist of either five or seven board members (called trustees) based on the district's enrollment and are elected by district residents. If a school district has an enrollment of less than 1,000 students, the number of board members is five. If the district enrolls more than 1,500 students, the number of board members is seven. Districts with enrollments between 1,000 and 1,500 students have seven board members but may opt for only five with the successful passage of a board resolution.

What is the length of school board members terms of office and how are they elected?

Board trustees serve four year terms and are elected on even numbered years. Method of election is dependent upon the schools student enrollment. See NRS 386.120-200 for specific details.

3.2 Organization

How are Nevada school district boundaries established?

Nevada school districts are patterned after county boundaries. The Carson City school district has been declared by the legislature to be considered a county school district. It can therefore be said that Nevada school district boundaries coincide with county boundaries. The 17 school districts range from very small (a few hundred students) to the Clark County school district which enrolls more than 60% of the state's student population.

3.3 Board Meetings and the Open Meeting Law

What are the general requirements of the Nevada Open Meeting Law?

The Nevada Open Meeting Law (NRS Chapter 241) generally requires all public business conducted by governing bodies to be noticed and held in a public forum. The Nevada Attorney General publishes an excellent summary of the law and answers to frequently asked questions.

When must a school board have a public meeting?

Any time a quorum of the school board or a committee appointed by the school board is scheduled to deliberate toward a decision or to make a decision (NRS 241.015).

What are the procedural requirements of the Open Meeting Law?

Except in an emergency, the meeting must be posted not later than 9 a.m. at least 3 working days prior to the meeting, not including the day of the meeting. The notice must be written, posted in 4 public places including the location of the public meeting, contain a list of the locations where the notice was posted and must designate an agenda, action items and a time for public comment (NRS 241.020(2)(3)).

Can the school board meet in closed session prior to appointing a new superintendent?

No. The law is clear that meetings may not be closed to discuss the appointment of any person to public office or as a member of a public body (NRS 241.030(3)(e)).

Can the school board meet in closed session to evaluate the professional competence of its superintendent or other persons or employees?

Yes. Provided the person that is the subject of the closed session is provided 5 days hand delivered notice or 21 days notice via certified mail the school board may hold a meeting to "consider the character, alleged misconduct, professional competence, or physical or mental health" of the superintendent or any other person (NRS 241.033(1)).

Are student disciplinary actions subject to the Open Meeting Law?

No. Suspensions and expulsions of pupils are not subject the NRS Chapter 241 and such hearings must be closed to the public.

Are labor negotiations or meetings with the school district's management representative subject to the Open Meeting Law?

No. Labor negotiations and meetings between the school board and the school districts management representative are exempt from Nevada's Open Meeting Law (NRS 288.230).

3.4 Ethics and Code of Conduct

What ethical rules apply to votes by the school board?

The Code of Ethical Standards applies to actions of the school board (NRS 281.481). A public officer may not approve, disapprove, vote, abstain from voting or act upon any matter regarding which he has accepted a gift/loan, which would reasonable be affected by his private commitment in a private capacity to the interest of others or in which he has a pecuniary interest without full disclosure at the time the matter is considered. Such disclosure shall be made in public to the chairman and other members of the board (NRS 281.501).

May a relative of a school board member be an employee of the school district?

Generally, school trustees may not employ relatives within the third degree of consanguinity or affinity. There is an exception for teachers or other school employees where the person is not related to more than one of the trustees if there is a unanimous vote of all members of the board and approval by the state department of education (NRS 281.210).

What if a school board member has an interest in a matter coming before the school board?

The board member should disclose the conflict and abstain from discussion and voting on the item.

3.5 Public Records

What are public records that have to be disclosed to the public?

Generally, all public records of a school district not otherwise declared to be confidential must be open to the public at all times during office hours.

Is it a crime to refuse to provide public records to members of the public?

Yes. A person who willfully and unlawfully conceals a public record may be guilty of a felony (NRS 239.310). However, a public officer or employee who acts in "good faith" in disclosing or refusing to disclose public records is immune from liability for damages.

Are student records public records which must be disclosed to any member of the public?

No. Student records are covered by federal law (FERPA) and may only be disclosed to the parents, guardian and, in certain circumstances, the student. See Chapter 9 of this text for more information regarding FERPA.

Chapter 4

Superintendents, Administrators, and Principals

4.1 Superintendent Qualifications

What are the statutory qualifications for a superintendent of a school district?

A school board may employ any person licensed for the position of administrator to serve as the superintendent of schools of the school district (NRS 391.110). The commission on professional standards may require the superintendent of any school district to hold a master's degree.

4.2 Term of Employment

May a superintendent be employed for more than one year?

Yes. A superintendent of schools may be employed for an initial term not to exceed 4 years. The term of any subsequent employment may be of any duration (NRS 391.110(2)).

Is the superintendent employed "at will"?

No. A superintendent may only be dismissed for cause (NRS 391.110).

4.3 Powers and Duties

What are the powers and duties of the superintendent?

The school board is to define the powers and fix the duties of the superintendent. Generally, school boards enter into a written agreement that requires the superintendent to carry out board policies, run the district on a day-to-day basis, evaluate subordinates, ensure compliance with statutory dates for evaluations and notices to rehire, and to prepare the budget in accordance with NRS Chapter 354.

4.4 Administrators/Building Principals

What is a school administrator?

A school administrator is any employee who holds a Nevada administrator's license and who is employed in the capacity of an administrator either as an assistant or deputy superintendent in charge of personnel or curriculum or as a building principal supervising teachers.

A teacher, on the other hand, is a licensed employee the majority of whose working time is devoted to the rendering of direct educational service to pupils of the school district (NRS 391.311(1)(8)).

Are school administrators and building principals subject to a probationary period?

Yes. An administrator who has completed his probationary period as a teacher and is thereafter promoted to the position of building principal must serve an additional probationary period of one year (NRS 391.3197(7)).

Are school administrators employed "at will"?

School administrators must serve a two year probationary period and similar to teacher's probationary periods, will have the second year waived if all evaluations are satisfactory (NRS 391.3197). When the administrator accepts a postprobationary contract, he/she can only be subject to a disciplinary termination for "legal cause" pursuant to NRS 391.312.

When are administrators evaluated?

Administrators must be evaluated in writing by the superintendent at least once each year (NRS 391.3127).

Does a postprobationary school administrator have any rights to appeal or contest a disciplinary termination?

Yes. Like a teacher, an administrator may request a due process hearing pursuant to NRS 391.311-3197 or according to negotiated disciplinary procedures if addressed in the employee's collective bargaining agreement (NRS 391.3116).

May a school administrator be represented by an employee organization or bargaining unit pursuant to NRS Chapter 288?

Generally yes. A building principal, assistant principal or other school administrator shall not be a member of the same bargaining unit with public school teachers unless the school district employs fewer than five principals but may join with other officials of the same specified ranks to negotiate as a separate bargaining unit (NRS 288.170(2)).

Chapter 5

Professional Teaching Staff

5.1 Qualifications

Do teachers have to be citizens of the United States?

Yes. In Nevada, it is unlawful to issue a teacher's license to a person who is not a citizen of the United States or who has filed a valid declaration to become a citizen or valid petition for naturalization (NRS 391.060). This prohibition does not apply to teachers authorized to teach in the United States under teacher exchange programs authorized by Congress (NRS 391.070).

Is a teacher required to take and subscribe to an oath of office?

Yes. With the exception of teachers employed under a valid exchange program all teachers must take and subscribe to the constitutional oath of office before entering the classroom (NRS 391.080).

What is the requirement for knowledge of the United States and Nevada's constitution?

All teachers granted a license to teach must produce satisfactory evidence of "adequate knowledge" of the origin, history, provisions and principles of the Constitution of the United States and the constitution of the state of Nevada (NRS 391.090).

Must all teachers be fingerprinted prior to being employed by a school district?

Yes. All teachers seeking employment in a school district must, as a condition of employment, submit a full set of fingerprints and written permission for a FBI background check based on the fingerprints (NRS 391.100(3)).

5.2 Certifications and Licensure

Is a teacher's license a right or a privilege?

License(s) issued by the superintendent of public instruction is "a revocable privilege and no holder of such a license acquires thereby any vested right" (NRS 391.051).

What are the kinds of licenses for professional teaching staff?

There is a license to teach elementary education and a license to teach secondary education, which authorizes the employee to teach in his major and/or minor field of preparation. There are also special licenses which allow the employee to teach or perform other educational functions in a school or program as designated in the license (NRS 391.031).

Are conditional licenses issued?

Yes. The superintendent of public instruction may grant conditional licenses to teachers and other educational personnel. A person granted a conditional license must complete all courses of study and other requirements for a license within three years after the date on which a conditional license is issued (NRS 391.032).

What are the specific requirements for Nevada teacher licensure?

The specific requirements for teacher licensure are different for elementary and secondary education and are established by the Nevada Commission on Professional Standards. The examinations for the initial licensing of teachers and other educational personnel must test the ability of the applicant to teach and his knowledge of each specific subject he proposes to teach. Each examination must include (a) the laws of Nevada relating to schools, (b) the Nevada Constitution, and (c) the United States Constitution (NRS 391.021).

The Commission adopts regulations (NAC) setting forth the qualifications for licensing teachers and other educational personnel and the procedures for the issuance and renewal of such licenses. Readers interested in the current specific requirements for Nevada teacher licensure should contact the Commission and/or consult the latest revisions of the NAC.

How are teachers employed by the school district?

Teachers are employed under a written contract of employment with the local school board which specifies the term of employment, salary, and other conditions of employment (NRS 391.120).

5.3 Probationary Teachers

What is the term of employment of a probationary teacher?

Probationary teachers are employed on a contract basis for two one-year periods and have no right to employment after either of the two probationary contract years (NRS 391.3197(1)). However, the second year of probation shall be waived when the probationary employee meets the following qualifications:

> If a probationary employee has received during the first school year of his probationary period three evaluations which state that the employees's overall performance has been satisfactory, the superintendent of schools of the school district or his designee shall waive the second year of the employee's probationary period by expressly providing in writing on the final evaluation of the employee for the first probationary year that the second year of his probationary period is waived. Such an employee is entitled to be a postprobationary employee in the ensuing year of employment.
>
> NRS 391.3197(4)

What are the "reemployment" notice requirements for probationary teachers?

The employing school board is required to notify the probationary teacher on or before May 1st of the school year whether he is to be reemployed for the next school year. He must accept or reject the offer of reemployment in writing within 10 days after the date of notification. Failure to advise the school board constitutes rejection of the contract (NRS 391.3197(2)).

Does the probationary period start anew for postprobationary teachers who obtain employment with another Nevada school district?

No. Once a teacher has received postprobationary status pursuant to NRS 391.3197 he cannot be required to serve another probationary period (NRS 391.31965).

When does a probationary teacher become postprobationary?

A probationary teacher who has completed his two-year probationary period and has received notice of reemployment is entitled to be a postprobationary teacher in the third year of employment. The exception to the two-year probationary period is the waiver granted after one year of successful teaching when all three evaluations have been satisfactory or better. See the question above regarding term of employment of a probationary teacher for the NRS text of this provision.

5.4 Intent to Rehire Postprobationary Teachers

When are postprobationary employees entitled to notice of reemployment?

On or before May 1st of each year the school board must notify all postprobationary employees concerning their reemployment for the next year. Failure to provide such notification entitles the employee to reemployment for the next year on the same terms and conditions for the current year (NRS 391.3196). The May 1st deadline does not apply to employees recommended for demotion, dismissal or non-reemployment if proceedings have commenced but have not been finally decided by the school board.

When does the employee have to accept the notice of reemployment?

The employee must notify the school board in writing of his acceptance of employment by May 10th. Failure to provide such timely written acceptance is "conclusive evidence" of the employee's rejection of the contract (NRS 391.3196(3)).

What about employees represented by employee organizations?

The May 1st notification is not required for employees represented by an employee organization except in the case of a demotion, dismissal or decision not to reemploy the employee. Employees must still notify the school board of acceptance of employment by May 10th (NRS 391.3196(4)).

5.5 Admonitions and Plans of Assistance

What is a letter of admonition?

Whenever an administrator charged with supervision of a teacher believes there may be a basis for demotion, dismissal or a refusal to reemploy, he must give the teacher a written admonition stating the reasons for the admonition and that it may lead to his demotion, dismissal or refusal to reemploy him. The administrator is required to assist the employee to correct whatever appears to be the cause for the admonition. Reasonable time not to exceed 3 months must be provided for the first admonition (NRS 391.313(1)).

How long may an admonition remain in the teacher's file?

If the employee meets the standards of the admonition within the time granted for improvement the admonition and all notations and indications it was issued must be immediately removed from the teacher's file. In any event the admonition must be removed not later than 3 years after it is issued (NRS 391.313(1)(b)).

Must admonitions be issued prior to the termination of probationary teachers?

Not if the employee received a notice pursuant to NRS 391.3125(4) by February 15th of the school year.

What is a plan of assistance?

A plan of assistance is a written set of specific goals, time lines, and performance-based criteria developed by the teacher and the administrator with a limited time frame for implementation by the teacher and evaluation by the administrator. Failure to "substantially" comply with a plan of assistance can be the basis for termination.

5.6 Evaluations of Teachers and Administrators

What are the general requirements for the evaluation of teachers in Nevada?

Each school board is responsible for developing objective narrative evaluations with input from teacher representatives. Overall performance is determined to be satisfactory or unsatisfactory. Postprobationary teachers have to be evaluated at least once each year and probationary employees have to be evaluated three times per year. Evaluations, although primarily for "constructive assistance," must be used in the dismissal process. If probationary or postprobationary teachers are in need of improvement, recommendations must be noted on the evaluation and reasonable efforts to assist the teacher must be made. Evaluations may include input from administrators, pupils, other teachers, and/or the teacher being evaluated.

Is a school board required to adopt a policy for evaluation of its teachers and administrators?

Yes. Each Nevada school board is required to develop a policy for objective evaluations in narrative form. Such policy is to be developed following "consultation with and involvement of" representatives of the teachers and administrators (NRS 391.3125(2) and 391.3127(1)).

When must a probationary teacher be formally evaluated?

Probationary teachers are entitled to a conference and written evaluation not later than December 1st, February 1st and April 1st of the school year. Probationary teachers assigned to a year-round school must be evaluated 3 times during each 12 months on a schedule determined by the school board.

What about probationary teachers who will not be reemployed in the next year?

If an administrator believes a probationary teacher will not be reemployed the next school year, the teacher must be provided written notice of this fact in a document separate from the evaluation not later than February 15th. The notice must include the reasons for the potential decision not to reemploy or refer to the evaluation in which the reasons are stated. Such notice is not required if the probationary teacher has received a letter of admonition during the current school year (NRS 391.3125(4)).

How often must a postprobationary teacher be evaluated?

Each postprobationary teacher must be evaluated at least once each year.

What must be contained in an evaluation of a teacher?

The evaluation of a probationary or postprobationary teacher must, if necessary, include recommendations for improvements in his performance (NRS 391.3125(6).

5.7 Discipline and Discharge

What is the procedure for discipline and discharge of teachers?

An employee subject to a collective bargaining agreement may be dismissed or not reemployed pursuant to disciplinary and discharge procedures contained in the negotiated agreement (NRS 391.3116). If there are no separately negotiated disciplinary and discharge procedures then the procedures of NRS 391.311 to 391.3197 provide the exclusive procedure for such dismissal and refusals to reemploy.

Under the statutory procedure the typical chronology of terminating a postprobationary teacher includes:

a. Written admonition based on substandard evaluation or specific misconduct (NRS 391.313).
b. Plan of assistance setting goals for correcting substandard performance (NRS 391.313).
c. Written notice that the superintendent intends to terminate or nonrenew the teacher (NRS 391.317).

d. A due process hearing before a hearing officer with the recommendation either binding or nonbinding on the school board (NRS 391.3193).
e. The recommendation of the hearing officer and the superintendent is filed with the school board with the school board making the final decision unless the recommendation of the hearing officer is final and binding (NRS 391.3194).
f. Judicial review (NRS Chapter 233B).

5.8 Due Process

What is meant by "Due Process" for teachers?

Guaranteeing reasonable procedural safeguards to individual citizens has long been valued in our national heritage, dating from the English Magna Carta in 1215. Due process for teachers (and for all citizens) is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution which assure that no person shall be deprived of "life, liberty, or property, without due process of law."

Originally meant as safeguards against unjust incarceration and protections for real estate ownership, "liberty" and "property" guarantees have gained expanded meaning in the context of educational law. These protections, unlike unqualified rights to "equal protection," have been determined to protect only tenured or postprobationary teachers who, through state tenure and contract law, gain due process protection. They gain these protections because, as postprobationary teachers, they have earned an "expectation of reemployment" which means that district officials must follow careful procedures in disciplining teachers or moving to nonrenew their contracts.

The United States Supreme Court in the landmark *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann* cases determined that postprobationary or tenured teachers are entitled to due process of law under the Fourteenth Amendment prior to being terminated. The High Court also determined in *Pickering v. Board of Educ.* that teachers enjoy a limited First Amendment right to express opinion criticizing the actions of the school administration when such expression is found to relate to matters of public interest or concern. (In Marvin Pickering's case, he authored an article critical of the board and superintendent's handling of a school bond issue).

5.9 Reasons for Teacher Dismissal

What reasons are frequently cited in teacher dismissal cases?

Typical reasons for teacher dismissal follow along with generally accepted definitions (NRS 391.312):

Inefficiency (NRS 391.312(1)(a))

The terms "inefficiency" and "incompetency" are closely allied, if not synonymous, and connote a lack of some professional ability. Inefficiency may include the following types of conduct:

- Inability to maintain discipline.
- Intellectual inadequacies and deficiency in preparation.
- Improper teaching techniques.
- Refusal to accept teaching advice of supervisor.
- Emotional instability and lack of self-control in the classroom.
- An undesirable attitude and a relative lack of achievement on the part of the teacher's students.
- Lack of knowledge required to teach one's students.
- Lack of ability to project knowledge effectively to his students.

Immorality (NRS 391.312(1)(b))

Immorality has been specifically defined in Nevada statute. Some of the acts forbidden under this statute are sexual assault, statutory sexual seduction, battery with intent to commit a crime, abuse, neglect or endangerment of a child, incest, open and gross lewdness, indecent or obscene exposure, annoyance and molestation of a minor, and crime against nature.

The 1997 Nevada legislature passed legislation prohibiting any person employed in a position of authority by a public or private school from engaging in sexual conduct with a pupil who is 16 or 17 years of age. (Students under 16 years of age were protected by existing statute.) Sexual conduct includes not only sexual intercourse but any physical contact of a sexual nature (SB 122, 1997 amending NRS Chapter 201).

Unprofessional Conduct (NRS 391.312(1)(c))

Unprofessional conduct materially impairs a teacher's educational effectiveness. The following are examples of such behaviors:

- Lack of knowledge of or disregard for the proper relationship of the teacher to the students.
- Physically threatening attitudes, language, or behavior.
- Actions which are detrimental to an effective school climate.
- Slanderous or libelous statements by a teacher.
- Verbal or physical abuse of students or coworkers.
- Abusive absence from work.
- Falsification of information or abusive language directed toward superiors and/or school board.

Insubordination (NRS 391.312(1)(d))

- Any persistent violation of directives by administrators or supervisors regarding issues such as a) student discipline, b) requiring problem students to be sent to the principal's office, c) use of library facilities and other school facilities by students while scheduled to be in class, and/or d) use of and cleanliness of classroom. See *Rust v. Clark County Sch. Dist.*, 100 Nev. 372 (1984).
- Failure to allow supervisory personnel to observe him or her in the classroom.

Neglect of Duty (NRS 391.312(1)(e))

Neglect of duty usually involves persistent violation of school laws, rules, regulations, or directives such as:

- Tardiness in violation of school policies.
- Failure to handle assignments given pursuant to school rules, regulations, and policies including co-curricular duties.
- Failure to complete lesson plans and reports required by the school board, administration, and state department of education.

Other Causes

Other causes are not as broad a category as might be anticipated, typically referring to financial and/or enrollment shortfalls that require a reduction in the number of teachers or administrators. This action, most often called Reduction in Force, or "RIF," is defined in Nevada statute as "a justifiable decrease in the number of positions due to decreased enrollment or district reorganization"(item g below). RIF policies are often solely determined by seniority as a result of union negotiation. However, many American school districts have renegotiated these policies in an effort to improve schooling and now include, in addition to seniority, such considerations as competency, program priorities, administrative recommendations, and teacher contributions to school activities.

What are the statutory reasons for teacher or administrator dismissal?

The Nevada Revised Statutes (391.312) lists 16 reasons "a teacher may be suspended, dismissed, or not reemployed and an administrator may be demoted, suspended, dismissed, or not reemployed":

(a) Inefficiency [see definition above]
(b) Immorality [see definition above]
(c) Unprofessional conduct [see definition above]
(d) Insubordination [see definition above]
(e) Neglect of duty [see definition above]
(f) Physical or mental incapacity
(g) A justifiable decrease in the number of positions due to a decreased enrollment or district reorganization [see explanation above]
(h) Conviction of a felony or of a crime involving moral turpitude
(i) Inadequate performance
(j) Evident unfitness for service
(k) Failure to comply with such reasonable requirements as a board may prescribe
(l) Failure to show normal improvement and evidence of professional training and growth
(m) Advocating overthrow of the Government of the United States or of the State of Nevada by force, violence or other unlawful means, or the advocating or teaching of communism with the intent to indoctrinate pupils to subscribe to communistic philosophy

(n) Any cause which constitutes grounds for the revocation of a teacher's license

(o) Willful neglect or failure to observe and carry out the requirement of this Title

(p) Dishonesty

Authors' Note: According to Nevada Revised Statute 391.313(3), a licensed employee is subject to immediate dismissal (without admonition required) on the grounds contained in paragraphs (b), (f), (g), (h), and (p).

5.10 Copyright Laws and Guidelines Affecting the Professional Teaching Staff

What is the "fair use" doctrine and how does it impact educators and students?

The doctrine or concept of "fair use" provides judicially-created exceptions to absolute control of material by a copyright holder—in the words of a Ninth Circuit Court of Appeals ruling, the "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." Congress incorporated the "fair use" doctrine into the 1976 Copyright Act, which attempts to assess "fair use" or copyright abuse using the following factors:

- The purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

The Copyright Act of 1976, as amended,
17 USC § 101 et seq.

"Fair use" guidelines, which do not have the force of law, have been developed by congressional conference committees with input from the Public Broadcasting System (PBS) and other media representatives to further encourage the equitable use of copyrighted materials. Guidelines typically allow single copies of written material to be used for teaching or research by non-profit organizations. When disseminating multiple copies of copyrighted material, 10 percent of the work is usually considered the maximum. Users must credit the copyright holder and are encouraged to seek copyright approval when future use of the materials is anticipated. Music, lyrics, and music video also fall under the 10 percent guideline, but not to exceed 30 seconds of the work. Motion media also falls under the 10 percent maximum or three minutes, whichever is less. The guideline for illustrations or photographs is no more than 10 percent or 15 images, whichever is less.

In 1981, PBS drafted a set of guidelines for the recording and replay of television programming. Replay must occur within ten calendar days, repeated only once "when instructional reinforcement is necessary," then erased. A special dispensation of an additional 35 calendar days is allowable for specific reasons, such as teacher review. There are several other restrictions such as a limitation of no more than one request per teacher for a given program. Adherence to PBS's interpretation of "fair use" guidelines makes the storing and retrieval of instructional videos for appropriate and timely instructional use by educators a virtual impossibility. It should be noted that PBS has recently negotiated several off-air copyright agreements that allow for an extension of the ten-day retention period for selected programs.

Recent additions to the "fair use" guidelines remind educators and students that reproduction of copyrighted computer programs, even for educational uses, are outside the scope of the guidelines. Educators are advised to exercise caution in using digital material downloaded from the Internet because of the possible mixture of copyrighted and public domain works on the network. Access to works on the Internet does not automatically mean that they can be reproduced and reused without permission and royalty payment. There is also the possibility that some copyrighted works may have been posted to the Internet without authorization of the copyright holder. Several Web sites related to copyright issues are available, including the Conference on Fair Use: An Interim Report to the Commissioner/U.S. Patent and Trademark Office and Fair Use Guidelines for Educational Multimedia.

Are teachers legally required to follow "guidelines"?

A note of caution is in order regarding guidelines not having the force of law. When such guidelines are adopted by an authority such as a school board of trustees, the "guidelines" become board policy requiring adherence by all employees.

Chapter 6

Statutory Employee Benefits

6.1 Compensation

Who sets compensation for Nevada school employees?

The school district board of trustees sets the compensation for its superintendent and other nonrepresented, i.e., nonunion and bargaining exempt employees. Compensation for represented teachers and other school support employees is established through collective bargaining pursuant to NRS Chapter 288 (discussed in Chapter 7).

How are teacher salaries determined?

The salaries of teachers and other school employees must be "determined by the character of the service required" (NRS 391.160). School districts are prohibited from discriminating between male and female employees in the matter of salary.

What about teachers with prior Nevada teaching experience?

Teachers with prior Nevada teaching experience must be given the same credit for previous teaching experience as he was receiving from his former Nevada school district. Such calculation of prior experience includes credit for the "final year" of service with his prior Nevada school district (NRS 391.160(2). This provision does not require that the teacher be given "more credit for previous teaching experience than the maximum credit for teaching experience provided for in the schedule of salaries established by it for its licensed personnel."

6.2 Transfer of Nevada Tenure

Do teachers who transfer between Nevada school districts retain their tenure or postprobationary status?

Yes. Teachers who achieve postprobationary status in one Nevada school district must be allowed to continue as a postprobationary employee if hired by another Nevada school district (NRS 391.31965).

6.3 Sick Leave

What is the accrual rate of sick leave for school employees?

An employee may not be credited with more than 15 days of sick leave in any one year (NRS 391.180). This maximum does not restrict the use of leave for which the employee may be qualified under the Family and Medical Leave Act of 1990. FMLA leave for qualified employees is limited to 12 weeks in any 12 month period.

May Nevada school employees transfer accumulated sick leave from one Nevada school district to another?

Yes. Accrued sick leave is transferred between Nevada school districts (NRS 391.180(6)).

What takes precedence if sick leave benefits are addressed in a collective bargaining agreement?

If sick leave benefits contained in a collective bargaining agreement (CBA) negotiated pursuant to NRS Chapter 288 exceed those in NRS 391.180, then the provisions of the CBA supersede any conflicting statutory provisions.

6.4 Worker's Compensation

Are Nevada school employees covered by worker's compensation benefits for work related injuries and illnesses?

Yes. All Nevada school employees are covered by either workman's compensation insurance under the state of Nevada Industrial Insurance System or under a self-funded plan approved by the state of Nevada (NRS Chapters 616 and 617).

When must industrial injuries be reported by employees?

Immediately after the date of the work related injury or illness the employee is required to file a notice of injury with the employer who must either forward the report to SIIS or the third party administrator for the self-funded plan.

Is light duty required for work-related injuries?

No. While light duty is often times beneficial to the employee and the employer, it is not mandated by NRS Chapter 616.

6.5 Unemployment

Are Nevada school employees entitled to unemployment compensation for summers and scheduled school vacation periods such as Easter and Christmas?

No.

6.6 Public Retirement (PERS)

What is the contribution rate and qualifying period for Nevada PERS?

Nevada public employees are vested in the Public Employee's Retirement System after five years of qualifying service. The current contribution rate is 18.75 percent of the employees base salary and other compensation that is subject to Nevada PERS. On a Nevada PERS retirement the employee is generally entitled to 2.5 percent per year times the number of qualifying years based on the average of the last three years of employment.

May Nevada school employee's elect to participate in the Nevada Public Retirement System?

No. Nevada's PERS is mandatory for all public employees.

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No. Nevada's PERS is mandatory for all public employees.

6.9 Rest and Meal Periods for Classified School Employees

Unless covered by a collective bargaining agreement, classified school employees are entitled to a meal period of at least one-half hour per 8 hour work period. The meal period is not counted as hours worked. Such employees (not covered by a collective bargaining agreement) are also entitled to a minimum 10 minute rest period for each 4 hours worked. Authorized rest periods are counted as hours worked for which there shall be no deduction from wages (NRS 608.019).

6.10 Resignation or Discharge of Classified School Employees

When must an employee be paid his final wages?

The employee who resigns or is discharged must be paid all outstanding wages earned either on the day he would have regularly have been paid or no later than 7 days after he resigns or quits (NRS 608.030).

Chapter 7

Employee Relations and Collective Bargaining

Nevada school districts generally implement personnel policies and procedures for their employees through managerial discretion. Represented or unionized employee groups negotiate with their school district over wages, hours and other terms and conditions of employment discussed in this chapter. The Local Government Employee-Management Relations Board (EMRB) supervises the collective bargaining process in Nevada which also has exclusive jurisdiction over prohibited practices (unfair labor practices) complaints.

To have the right to collectively bargain an employee organization must first apply for and be recognized by the local school district. Bargaining typically begins promptly following February 1st of each year in which a collective bargaining agreement expires unless the parties agree to delay negotiations to later in the year. Bargaining wages and other monetary subjects in Nevada typically await "count day" and receipt of the prior year audit so that the school district knows its financial posture and ability to fund increased monetary benefits.

This chapter concentrates on the collective bargaining process for represented employee groups since all Nevada school districts have teacher and/or classified employee bargaining groups.

7.1 Local Government Employee-Management Relations Act

Do Nevada school employees have the right to negotiate monetary benefits and other conditions of employment?

Yes. In 1969 the state of Nevada enacted the Local Government Employee-Management Relations (Dodge) Act (Nevada Revised Statutes

(NRS) Chapter 288). The purpose of the Dodge Act was to give collective bargaining rights to certain public employees including teachers, certain administrators, and classified support employees.

Collective bargaining in Nevada is defined as:

> [A] method of determining conditions of employment by negotiation between representatives of the local government employer and employee organizations, entailing a mutual obligation of the local government employer and the representative of the local government employees to meet at reasonable times and bargain in good faith with respect to
>
> 1. Wages, hours and other terms and conditions of employment;
> 2. The negotiation of an agreement;
> 3. The resolution of any questions arising under a negotiated agreement; or
> 4. The execution of a written contract incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> NRS 288.033

The Dodge Act governs all labor-management relations between "local government employers," and their employees and recognized labor organizations. "Local government employer" is defined under the Act as including ". . . school districts . . ." (NRS 288.060).

Prior to the Dodge Act, Nevada's school employees had no formal collective bargaining rights. After the Dodge Act school employees had bargaining rights previously reserved only to private sector employees under the National Labor Relations Act.

Do Nevada school employees have the right to strike?

No. Public employees in Nevada do not have the right to strike (NRS 288.230(6)). Strikes by Nevada public employees, including school employees, are illegal and if commenced or continued in violation of a court's injunction may subject the employee organization to fines up to $50,000/day (NRS 288.240 and 288.250).

7.2 Employee-Management Relations Board

What state agency oversees public sector collective bargaining?

The Local Government Employee-Management Relations Board (hereinafter EMRB) was created under the Dodge Act to oversee administration of the Act. The EMRB is a three person body appointed to four year terms by the governor (NRS 288.080).

What is the jurisdiction of the EMRB?

The EMRB is to "hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of (NRS Chapter 288) by and local government employer, local government employee or employee organization" (NRS 288.110). The mission of the EMRB is to "maintain good-faith bargaining and harmonious labor relations in the public sector."

The EMRB has the exclusive jurisdiction under NRS Chapter 288 to:

a. Determine mandatory subjects of bargaining;
b. Hear and decide appeals regarding recognition of employee organizations;
c. Conduct bargaining elections;
d. Determine appropriate bargaining units;
e. Coordinated factfinding panels; and
f. Hear and decide unfair labor practice complaints.

The EMRB held that its power is limited to the above enumerated subjects (EMRB 16 - Reference is to EMRB Decisions - Item Numbers - Numerical listing attached as Appendix G covering decisions referenced in this Chapter). In addition the EMRB only has jurisdiction over entities that are either local government employers or local government employee organizations (EMRB 17).

Does the EMRB hear disputes covered by negotiated grievance procedures?

No. The Board has taken a "hands off" approach to complaints of unfair labor practices that are in reality breaches of labor agreements that are subject to internal grievance procedures (EMRB 130). The EMRB held that "where the parties have not exhausted their contractual grievance provisions, the Board will not exercise its discretion to hear a complaint unless there is a clear showing of special circumstances or extreme prejudice" (EMRB 257; but see EMRB 277 & 288).

What rules does the EMRB apply in reaching its decisions?

The EMRB applies general rules of statutory construction when it interprets NRS Chapter 288 to determine the negotiability of various subjects. The EMRB generally applies specific over general statutes and later legislative enactments over prior enactments in construing whether certain items are mandatory subjects of bargaining (EMRB 23). The EMRB has adopted regulations to assist in carrying out its statutory mandate (NRS 288.110(1) & Nevada Administrative Code (NAC) Chapter 288).

Are the EMRB's decisions subject to appeal or judicial review?

Yes. The EMRB publishes its decisions and orders which are subject to judicial review under NRS Chapter 233B, Administrative Procedure Act (NRS 288.130 & 233B.010 et seq.).

What deference is given decisions of the EMRB?

The Nevada Supreme Court held that unless the EMRB:

> Should act arbitrarily, unreasonably or capriciously beyond administrative boundaries the Courts must give credence to the findings of the board. An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action."
>
> *Clark County Sch. Dist. v. EMRB*, 90 Nev. 442, 445; 530 P.2d 114 (1974)

In further commenting on the deference courts should give EMRB decisions, the Nevada Supreme Court held:

> We are loathe to commit the board, which has been charged by the legislature with the duty to administer he act regulating pub-

> lic employee collective bargaining in this state, to any particular policy course not clearly dictated by the terms of the statute itself.
>
> *EMRB v. General Sales Drivers,*
> 98 Nev. 94, 98; 694 P.2d 498 (1982)

The Nevada Supreme Court has, however, not been reluctant on occasion to find the decision of the EMRB or the district court in affirming the Board was "clearly erroneous" (*Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 102; 715 P.2d 1321 (1986).

7.3 Practice Before the EMRB

Who may appear and practice before the EMRB?

In addition to Nevada licensed attorneys, a representative of an employee organization who is also an employee of the local government employer may appear before the Board (NAC 288.278(2); but see EMRB 301).

7.4 Recognition Matters

Are all school employees required to belong to a recognized employee organization?

No. Nevada is a "right to work" state where membership in the employee organization or bargaining unit is optional and at the discretion of the individual employee (NRS 288.140).

Who is responsible for determining the appropriate unit for bargaining?

It is primarily the employer's prerogative to determine the appropriate bargaining unit(s) (NRS 288.170(1); EMRB 339).

How does the employer determine which employees will be in a particular bargaining unit?

The determination of which employees will be within a negotiating or bargaining unit is primarily based on a "community of interest" among the employees concerned, e.g., teachers in a teachers bargaining unit.

school nurses in a nurses bargaining unit, and classified support employees in a classified employees bargaining unit.

Supervisory personnel may not be within the same negotiating unit as the employees they supervise (NRS 288.170(3)). Confidential employees are prohibited from joining any bargaining unit or employee organization (NRS 288.170(4)).

Is a confidential employee (for purposes of NRS Chapter 288) an employee that merely handles "confidential" materials such as personnel records or sensitive financial information?

No. The EMRB has held that the "essence of confidential status is the relationship of the employee to labor relations decisions of management" (EMRB 21 & 322). A "confidential employee" means "an employee who is involved in the decisions of management affecting collective bargaining" (NRS 288.170(6)).

What is recognition of an employee organization?

Recognition under the Dodge Act means the "formal acknowledgment by the local government employer that a particular employee organization has the right to represent the local government employees within a particular bargaining unit" (NRS 288.067).

What does the employee organization do to seek formal recognition?

An employee organization petitions a local government employer by presenting:

a. A copy of its constitution and by-laws, if any;
b. A roster of its officers, if any, and representatives;
c. A pledge, in writing, not to strike against the local government employer under any circumstances.

NRS 288.160(1)

When can a school district contest or appeal a formal request for recognition?

The school district must file its request for a hearing to challenge the sufficiency of a petition for recognition within 5 days of receipt (NAC 288.143).

The EMRB will order a local government employer to recognize an employee organization where the requirements of NRS 288.160(1) are satisfied and the employee organization represents a majority of the employees eligible for membership (EMRB 289; but compare EMRB 303).

When may employees attempt to break away from established employee organizations?

The application for recognition for a "breakaway" employee organization must be made during the "window period" during which contract negotiations are taking place between the local government employer and the parent employee organization. Nevada is a "contract bar" jurisdiction where the recognition of "breakaway" employee organizations is prohibited when the contract has not expired or was not reopened for negotiations (EMRB 120). The EMRB has held that the window period opens when the incumbent organization files notice pursuant to NRS 288.180(1) of its desire to negotiate a successor agreement and closes when negotiations for a successor agreement commence. Additionally, a 30-day window period opens 242 days prior to expiration and closes 212 days prior to the expiration date (EMRB 313).

Does the EMRB allow the proliferation of smaller bargaining units?

Not generally. Throughout the history of NRS Chapter 288 the EMRB has consistently held that the "interests of both local government employers and local government employees are best served by establishing large bargaining units of employees rather than a proliferation of smaller units." The Board has stated that "clear and convincing evidence is necessary to persuade the Board to 'carve out' smaller units from a large unit" (EMRB 9 & 96).

When are elections conducted by the EMRB?

If the EMRB has a good faith doubt as to whether the employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot. The decision of the EMRB whether to conduct an election is binding on the employer and employee organization (NRS 288.161(4)). The EMRB has ordered an election where the parties stipulate to the conduct of an election (EMRB 302 & 302-A).

When can an employer withdraw recognition from an employee organization?

A public employer may withdraw recognition from an employee organization which:

a. Fails to present a copy of each change in its constitution or bylaws, if any, or to give notice of any change in the roster of its officers, if any, and representatives;
b. Disavows its pledge not to strike against the local government employer under any circumstances;
c. Ceases to be supported by a majority of the local government employees in the bargaining unit for which it is recognized;
d. Fails to negotiate in good faith with the local government employer if the employer first receives the written permission of the EMRB.

The EMRB has held that a local government employer must give formal notice of its withdraw of recognition (EMRB 99 & 223). The EMRB also requires a hearing before any withdraw of recognition (NRS 288.161(3) & NAC 288.145).

The EMRB approves the withdrawal of recognition of employee organizations (EMRB 294).

7.5 The Duty to Bargain in Good Faith

What is the duty to bargain in good faith?

The key to the concept of collective bargaining in Nevada and elsewhere is the requirement that employers and employee organizations meet at reasonable times and "bargain in good faith." The EMRB has held that in considering a claim that a party refused to bargain collectively in good faith the "totality of circumstances" in the particular case to determine if it appears that a party clearly indicated a desire not to reach agreement (EMRB 36). More than "a bare showing that the bargaining has been ineffective is necessary to find that a party refused to bargain in good faith" (EMRB 36). In reviewing allegations of bad faith bargaining, the EMRB looks to see whether the union or employer's conduct is "arbitrary, discriminatory or in bad faith" (EMRB 33). The EMRB has defined "arbitrary and capricious" as "without any reasonable cause based upon law; without reason given; and disregard of evidence" (EMRB 109).

Can the school district communicate with the "rank and file" employees?

Yes. The EMRB has held that an employer is free to communicate to its employees regarding work, even to the extent of any general or specific views about unionism as long as such communication does not contain a threat of reprisal or a promise of benefit (EMRB 114).

Can a past practice constitute a waiver of the school district's right to manage its operation?

Not necessarily. The EMRB has held that the past practice of determining a school calendar did not create or confer a benefit of condition of employment which the school district is required to continue subject to negotiation (EMRB 311).

Can an employer solicit input from represented employees as part of a classification and compensation study?

Yes. The EMRB has held that the solicitation of input from its represented employees (via a job analysis questionnaire) as part of a classification study, without the permission of the employee organization, is proper under NRS 288.150(3).

7.6 Negotiations

When do negotiations formally begin?

Negotiations begin when the parties to an existing or proposed collective bargaining agreement sit down, establish ground rules and advocate proposals that are mandatory subjects of bargaining. Negotiations are separate and distinct from the concept of "meet and confer." Generally, "mid-term" negotiations are considered statutorily barred unless conducted by mutual consent or pursuant to a previously agreed to re-opener to the collective bargaining agreement (EMRB 265).

Is the employee organization required to give written notice to the employer prior to the commencement of negotiations?

Yes. A condition precedent to negotiations of mandatory subjects is that the union give the employer written notification. If the subject of negotiation requires the budgeting of money, the notification must be made on or before February 1st prior to the expiration date of the contract. (NRS 288.180(1) & EMRB 30). The failure to provide the required written notification acts as a waiver to the right to negotiate (EMRB 30). The local government employer may, however, waive the requirement of notification "by clear and unequivocal manifestation to do so" (EMRB 30).

Do the parties have to agree to ground rules prior to the commencement of negotiations?

No. The parties may agree to certain ground rules to expedite the negotiations process. Ground rules are not, however, a mandatory subject and therefore a party may not refuse to negotiate if the parties are unable to reach agreement on ground rules (EMRB 54 & 253A). Neither party may dictate the composition of the other party's negotiations team (EMRB 86 & 89).

Are negotiations sessions open to the public?

No. The Dodge Act exempts negotiations from Nevada's Open Meeting Law (NRS 288.220(1)). The EMRB has held that unless the parties mutually agree to open negotiations sessions all negotiations sessions will be closed (EMRB 54).

Does the employer have to make concessions to the union during negotiations?

No. The law is clear that neither the union nor the public employer is required to make any concessions or agree to the opposing parties proposals (EMRB 62 & 93).

Are the parties required to continue negotiations once "impasse" is reached or declared by either party?

No. Once impasse is reached the parties are not required to "engage in continued fruitless discussions" (EMRB 62 & 93).

Can the employer unilaterally change benefit levels during negotiations?

No. During negotiations the local government employer is required to maintain the status quo for all benefits (EMRB 133 & 270). The unilateral change or reduction/increase of benefits during negotiations or during a contract period is an unfair labor practice (EMRB 270).

May a union refuse to sign a negotiated agreement which has been ratified by the parties?

No. Ratification procedures are an internal matter and once ratified the union must sign the agreement. See EMRB 239.

7.7 Scope of Bargaining

What is the scope of mandatory negotiations?

The EMRB requires local governments to negotiate all subjects that are "significantly related" to the mandatory subjects listed in NRS 288.150(2) unless the employer determines "the proposed matter would be reserved to the local government" pursuant to NRS 288.150(3).

NRS 288.150(2) lists the following 22 mandatory subjects of bargaining:

(a) Salary or wage rates or other forms of direct monetary compensation.
(b) Sick leave.
(c) Vacation leave.
(d) Holidays.
(e) Other paid or nonpaid leaves of absence.
(f) Insurance benefits.
(g) Total hours of work required of an employee on each work day or work week.
(h) Total number of days work required of an employee in a work year.
(i) Discharge and disciplinary procedures.
(j) Recognition clause.
(k) The method used to classify employees in the bargaining unit.
(l) Deduction of dues for the recognized employee organization.
(m) Protection of employees in the bargaining unit from discrimination because of participation in recognized employee organizations.
(n) No-strike provisions.
(o) Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of the collective bargaining agreement.
(p) General savings clause.
(q) Duration of the collective bargaining agreement.

(r) Safety of the employee.
(s) Teacher preparation time.
(t) Materials and supplies for classrooms.
(u) The policies for the transfer and assignment of teachers.
(v) Procedures for reduction in work force.

In addition, the EMRB has found the following items "directly and significantly" related to the above enumerated subjects and thus within the scope of mandatory bargaining (references are the EMRB decision item numbers):

1) Merit raises (EMRB 42).
2) Teacher evaluations (EMRB 212).
3) Physical agility tests if a condition of continued employment (EMRB 83).
4) Safety unless it impinges on another clearly defined management right (EMRB 146 & 264).
5) Effects of subcontracting (EMRB 159 & 160).
6) Unused sick leave (EMRB 168).
7) Job leave for court appearances (EMRB 174).
8) Sick leave bank for catastrophic illnesses (EMRB 174).
9) Selection of heath insurance administrator (EMRB 182).
10) Staffing for fire department (EMRB 196).
11) Prevailing rights as to mandatory subjects (EMRB 196).
12) Effects of successorship (EMRB 196 & 267).
13) Medical insurance for current employees after retirement (EMRB 271).
14) Health insurance premiums for employee dependents (EMRB 333).
15) Just cause (EMRB 340).

What management rights are reserved to the employer without negotiation?

NRS 288.150(3) reserves the following subjects to the local government employer without negotiations:

1) The right to hire, direct, assign or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline and subject to the policies for the transfer and reassignment of teachers.
2) The right to reduce in force or lay off any employee because of lack of work or lack of money, subject to negotiated procedures for reduction in work force.

3) The right to determine appropriate staffing levels and work performance standards,except for safety considerations.
4) The right to determine the content of the workday, including without limitation work load factors, except for safety considerations.
5) The right to determine the quality and quantity of services to be offered to the public.
6) The right to determine the means and methods of offering those services.
7) The safety of the public.

In addition the EMRB has found the following subjects to be management rights which are not mandatory subjects of bargaining:

1) Class size (EMRB 36).
2) Maintenance of standards (EMRB 36).
3) Criteria for merit raise (EMRB 42).
4) School calendar (EMRB 56).
5) Rules and regulations that are not mandatory subjects (EMRB 146 & 196).
6) Safety where it involves other clearly defined management rights (EMRB 146 & 264).
7) Decision to RIF/layoff employees (EMRB 158).
8) Decision to sub-contract (EMRB 159 & 160).
9) Grievance procedure for items not covered by collective bargaining agreement (EMRB 174).
10) Decision to institute double sessions (EMRB 202).
11) Physical agility test where no condition of continued employment (EMRB 264).
12) Decision to implement successorship (EMRB 267).
13) Decision to implement self-insurance for worker's compensation (EMRB 276).
14) Decision to enter into a managed care contract for the employer's worker's compensation program (EMRB 370).

7.8 Impasse Procedures

Are represented school employees required to participate in mediation or factfinding prior to last best offer arbitration?

No. In 1991 the Nevada legislature granted school employees, including represented teachers, administrators and school support (i.e., classified) employees, the right to "last best offer" arbitration after only four bargaining sessions (NRS 288.217).

How is the arbitrator selected?

The parties may agree to use the American Arbitration Association or the Federal Mediation & Conciliation Service. If the parties are unable to agree which service to use the FMCS must be utilized. A list of seven arbitrators is requested and the employee organization strikes the first name (NRS 288.200(2)). The fees and costs of the arbitrator are split by the parties (NRS 288.217(4)).

What is the procedure for "last best offer" arbitration?

NRS 288.217 sets forth the procedures for conducting arbitration of interest (bargaining) disputes between Nevada school districts and their certified and classified employees. The statute allows either party to declare impasse after four negotiations sessions and to submit the disputed issues to final and binding arbitration. The arbitrator is required to hold a hearing within 30 days after being selected and after 7 days notice to the parties (NRS 288.217(3)).

Can the interest arbitrator "split the baby" or pick and choose from the final offers?

No. The parties submit their final offers addressing all disputed issues and the interest arbitrator selects either the district or union final offer addressing all disputed issues (NRS 288.217(8)).

What are the criteria that the interest arbitrator applies to the dispute?

The interest arbitrator is first required to make a preliminary determination of financial ability of the school district to pay for the union's monetary proposals (NRS 288.217(5) & NRS 288.200(7)). If the school district asserts financial inability to pay any monetary increase the arbitrator will have to make a preliminary finding on the school district's ability to pay. Assuming current ability to pay the arbitrator applies the "normal criteria for interest disputes" which typically include ability to pay, external and internal comparability, CPI, turnover, recruitment data (in salary disputes), and language from other Nevada school districts in disputes involving non-monetary benefits, e.g., grievance and arbitration procedures.

Can the arbitrator recess the hearing to allow for further negotiations prior to the receipt of final offers?

Yes. The arbitrator may recess the hearing for a period of 3 weeks to allow for further negotiations. If agreement is not reached within 30 days each party shall submit a single written statement containing its final offer for each of the unresolved issues (NRS 288.217(6)).

Can the school district or union appeal an interest arbitration award?

Not as a general matter. The grounds for appeal are limited to those set forth in NRS Chapter 38. The award will only be vacated where the award was procured by corruption, fraud, or other undue means; there was evident partiality by the arbitrator; the arbitrator exceeded his power; the arbitrator refused to postpone the hearing on a showing of sufficient cause; or refused to hear evidence material to the dispute.

7.9 Unfair Labor Practices

What is an unfair labor practice (ULP)?

A ULP is an allegation by either the employer or the union that the other side failed to bargain in good faith, retaliated for union activity, or coerced union membership, etc.

Who has jurisdiction to hear and decide unfair labor practice complaints?

The Local Government Employee-Management Relations Board has exclusive jurisdiction to hear and decide unfair labor practice complaints.

Is there a time limit to filing an unfair labor practices complaint?

Yes. The complaint must be filed within six months after the occurrence which is alleged to constitute the unfair labor practice (NRS 288.110(4)).

Who has the burden of proof in an unfair labor practices complaint?

While the burden of proof is initially on the employee or employee organization to:

> make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision . . . [o]nce this is established, the burden of proof shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct . . . [t]he aggrieved employee (or employee organization) may then offer evidence that the employer's legitimate explanation is pretextual and thereby conclusively restore the inference of unlawful motivation (EMRB 215; *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 101,102; 715 P.2d 1321 (1986)). In determining whether an employer has interfered with an employee's rights under NRS Chapter 288 the EMRB has adopted the following standard: "The test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the act" (EMRB 237).

What is an unfair labor practice by a school district?

A prohibited or "unfair labor practice" generally means that the employer refused to bargain in "good faith." NRS 288.270 states that:

> It is a prohibited practice for a local government employer or its designated representative willfully to:
> (a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.
> (b) Dominate, interfere or assist in the formation or administration of any employee organization.
> (c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.
> (d) Discharge or otherwise discriminate against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because he has formed, joined or chosen to be represented by any employee organization.

> (e) Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and factfinding, provided for in this chapter.
>
> (f) Discriminate because of race, color, religion, sex, age, physical or visual disability, national origin or because of political or personal reasons or affiliations.
>
> (g) Fail to provide the information required by NRS 288.180.

Can a union or employee organization be charged with an unfair labor practice?

Yes. NRS 288.270(2) provides that:

> It is a prohibited practice for a local government employee or for an employee organization or its designated agent willfully to:
>
> (a) Interfere with, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.
>
> (b) Refuse to bargaining collectively in good faith with the local government employer as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and factfinding, provided for in this chapter.
>
> (c) Discriminate because of race, color, religion, sex, age, physical or visual disability, national origin or because of political or personal reasons or affiliations.
>
> (d) Fail to provide the information required by NRS 288.180.

What are examples of unfair labor practices found by Nevada's EMRB?

References are to Nevada EMRB item numbers. Names of specific decisions are included as an Appendix. Copies of decisions can be obtained by contacting the Nevada EMRB:

1) Circumventing the exclusive bargaining agent (EMRB 12).
2) Discipline for union activity (EMRB 15, 53, 66, 88, 94, 102a, 190, 115, 124, 215, 231, 236, 237, 246 & 248).
3) Threatening letter for continued union activity (EMRB 18).

4) An employer's in-service sessions with rank and file employees during negotiations (EMRB 28).
5) Refusal to negotiate (EMRB 43).
6) Certain misleading media advertisements (EMRB 52).
7) Certain condition precedents to bargaining (EMRB 54 & 253a).
8) End runs (EMRB 114 & 157).
9) Refusal to participate in mediation or factfinding (EMRB 155, 175 & 241).
10) Taking non-mandatory subjects to impasse (EMRB 139 & 196).
11) Unilaterally modifying existing benefits (EMRB 175, 248 & 270).
12) Failure to provide information during negotiations (EMRB 175, 241, 253a, & 299).
13) Promotional exam questions that call into question union membership (EMRB 197).
14) Discrimination - disparate treatment based on union membership (EMRB 215 & 231).
15) Threaten RIF/layoff during negotiations (EMRB 217 & 240).
16) Retaliation for appeal to administrative agency (EMRB 246).
17) Discipline of employee who insists on union representation (EMRB 246).
18) Condition negotiations on presence of stenographer (EMRB 253a).
19) Cancel bargaining sessions at the last minute (EMRB 269).
20) Repudiate agreements by Chief Negotiator (EMRB 269).
21) Fail to submit counter offers except for "take it or leave it" (EMRB 269).
22) Delay bargaining (EMRB 269).
23) City's refusal to proceed to factfinding (EMRB 295).
24) Laying off employees during unionization efforts (EMRB 358).
25) Refusal to deal with designated bargaining representative (EMRB 390-A).

What are examples of allegations found by Nevada's EMRB to not be unfair labor practices?

Examples include the following:

1) Rule prohibiting union activity during working hours (EMRB 1).
2) Management call meeting with employees before election (EMRB 1).

3) Requirement for teachers to belong to state and national organizations as condition of membership in local employee organization (EMRB 13).
4) Mere suspicion not enough to establish union activity as basis for discharge (EMRB 53).
5) Refuse to make concessions during bargaining process (EMRB 62 & 93).
6) Changing issues after deadlock unless tentatively approved or signed off (EMRB 103).
7) Noncoercive communication with rank and file (EMRB 114).
8) Disparate discipline based on rational basis, e.g., rank (EMRB 115).
9) Matching, i.e., "me too" agreements (EMRB 131).
10) Union representatives appearing at public board meeting (EMRB 157).
11) Disciplinary action for a legitimate business reason (EMRB 326).
12) Maintaining "inability to pay" position during negotiations (EMRB 366).

Is there a time limit to filing an unfair labor practices complaint?

Yes. The complaint must be filed within six months after the occurrence which is alleged to constitute the unfair labor practice (NRS 288.110(4)).

Chapter 8

Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

8.1 Section 504 of the Rehabilitation Act

What are the general provisions of Section 504 of the Vocational Rehabilitation Act?

In 1973, Congress acted to prohibit discrimination on the basis of disability by recipients of federal funds by passing the Vocational Rehabilitation Act (PL 93-112). This law was the first federal civil rights statute to protect the rights of individuals with disabilities. Section 504 of the Act, in its revised language, states:

> No otherwise qualified person with a disability . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> 29 USC § 794(a)(1996)

Who is considered a "person with a disability" under Section 504?

Section 504 defines "person with a disability" as "any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

What regulations were instituted to carry out the requirements of Section 504?

The regulations promulgated to carry out the statute are found in Title 34 of the Code of Federal Regulation, Part 104. The regulations contain six subparts:

Subpart A.	General Provisions
Subpart B.	Employment Practices
Subpart C.	Program Accessibility
Subpart D.	Preschool, Elementary, and Secondary Education
Subpart E.	Postsecondary Education
Subpart F.	Health, Welfare, and Social Services

What does Section 504 mandate regarding employment practices?

Subpart B of the 504 regulations indicates that no qualified person with a disability will, on the basis of a disability, be subjected to discrimination in employment under any program or activity which receives federal financial assistance. Section 504 would be violated in cases where a qualified person with a disability was denied employment solely by reason of a disability. If an employer denies employment to a person with a disability, it must be because the individual is not truly qualified to do the job.

What is a "reasonable accommodation"?

The law requires employers to make "reasonable accommodation" for a person with a disability who is otherwise qualified to do the job. A reasonable accommodation is any modification made to the job or allowance made in job performance that compensates for the employee's functional limitations or removes a barrier that prevents the employee from performing a particular task or activity. Examples of reasonable accommodations are modification of work schedules, physical modifications, relocation of offices or jobs, or job restructuring which means changing the work procedures of a particular job.

When is an accommodation considered unreasonable?

An accommodation is unreasonable if it imposes an "undue hardship" on the operation of the employer's program. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

How has Section 504 impacted the interviewing process?

When making hiring decisions, employers may not ask job applicants about the existence, nature or severity of a disability. It is also unlawful to require an applicant to take a medical examination before making a job offer unless all applicants are subject to a medical examination regardless of disability. Any inquiries or medical examinations of employees must be job-related and consistent with the employer's business needs. Employers should limit their preemployment inquiries to the applicant's ability to perform specific job-related functions also known as "bona fide occupational qualifications." (See Title I of the ADA for similar requirements applied to private schools and businesses.)

What does Section 504 require regarding program accessibility?

The Rehabilitation Act, in Subpart C, includes requirements for access to buildings and facilities. These requirements are restated in more detail in Title II of the Americans with Disabilities Act. See section dealing with Title II later in this chapter.

How have Section 504 issues been interpreted in court decisions?

Please see Appendix D for a summary of some of the more frequently cited case law interpreting Section 504 issues.

Authors' Note: The information regarding Section 504 was excerpted and adapted from the *Technical Assistance Document for Section 504 of The Rehabilitation Act of 1973*, published by the Special Education Branch of the Nevada Department of Education, November 1992, reprinted, February 1995.

8.2 The Americans With Disabilities Act, Title I

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. It extended civil rights protections to Americans with disabilities in much the same way that individuals are protected on the basis of race, color, sex, national origin, and religion. The ADA made it illegal to discriminate on the basis of disability in the areas of employment, public services, public accommodations, transportation, and telecommunications. The Act was organized in five major sections called Titles.

The Preamble to the ADA noted that:

> Enactment of the ADA reflects deeply held American ideals which treasure the contributions which individuals can make when free from arbitrary, unjust, or outmoded societal attitudes and practices that prevent the realization of their potential. The ADA reflects a recognition that the surest path to America's continued vitality, strength and vibrancy is through the full realization of the contributions of all of its citizens.

Although Title I of the Americans with Disabilities Act specifically applies to private sector employers (including private schools), the requirements may be used as guidelines for public school personnel practices since similar requirements are mandated by Section 504 of the Rehabilitation Act. (See Section 8.1 of this chapter for Section 504 coverage.)

Title II of the ADA which specifically covers program and facility accessibility is included in Section 8.3 of this chapter.

What employers are covered by Title I of the ADA?

The Title I employment provisions apply to private employers, employment agencies, and labor unions that employ 15 or more employees.

What practices and activities are covered by the employment nondiscrimination requirements?

The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Who is protected from employment discrimination?

Employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.

The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability may be covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or coworkers.

Who is a "qualified individual with a disability"?

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions, except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Does an employer have to give preference to a qualified applicant with a disability over other applicants?

No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability.

For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed if the higher typing speed is an essential function of the job.

What limitations does the ADA impose on medical examinations and inquiries about disability?

An employer may not ask or require a job applicant to take a medical examination before making a job offer. The employer cannot make any preemployment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a "direct threat" in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the "direct threat" level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other federal laws, examinations to determine current "fitness" to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

When can an employer ask an applicant to "self identify" as having a disability?

A preemployment inquiry about a disability is allowed if required by another federal law or regulation such as those applicable to veterans with disabilities and veterans of the Vietnam era. Preemployment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

What rules apply to interviewing?

Under Title I of the Americans with Disabilities Act, employers may not make inquiries about disabilities in job interviews, but may ask questions to determine if an applicant can perform specific job functions. A Technical

Assistance Manual published by the Equal Employment Opportunity Commission (EEOC) cites the following examples of impermissible inquiries:

1. Are you disabled? If so, describe the history of and type of disability.
2. Do you have any limitations on hearing, speech, or vision?
3. Have you been treated for any diseases?
4. Have you been hospitalized? Treated by a psychiatrist?
5. Have you been treated for drug or alcohol abuse?
6. Have you ever filed a workers' compensation claim?
7. How many sick days did you take last year?
8. Please list any conditions or diseases for which you have been treated in the past three years.
9. Are you taking any prescription drugs?
10. If the applicant has an obvious disability or volunteers information, the applicant may not be asked questions about the nature, severity/cause of the disability, prognosis, or whether special treatment or leave will be needed.
11. Former employers may not be asked about disabilities, illnesses, or workers' compensation history.

The following examples are inquiries which are not disability-related:

1. Can you perform the functions of this job (essential and/or marginal), with or without reasonable accommodation?
2. Please describe/demonstrate how you would perform these functions (essential and/or marginal).
3. Can you meet the attendance requirements of this job? How many days did you take leave last year?
4. Do you have the required licenses to perform this job?

Does the ADA require employers to develop written job descriptions?

No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to ensure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

What is "reasonable accommodation"?

Reasonable accommodation means modifications or adjustments to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has benefits and privileges in employment equal to those of employees without disabilities.

What are some of the accommodations applicant and employees may need?

Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly-situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

When is an employer required to make a reasonable accommodation?

An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

What are the limitations on the obligation to make a reasonable accommodation, i.e., what is an "undue hardship"?

The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Must an employer modify existing facilities to make them accessible?

The employer's obligation under Title I is to provide access for an *individual* applicant to participate in the job application process, and for an *individual* employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with coworkers. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

What is an "essential function" of a job?

Essential function means job tasks that are fundamental rather than secondary. What makes a job task essential? Reasons include but are not limited to:

1. If the position exists to perform the function.
2. If there are a limited number of employees among whom the function can be distributed.
3. If the function is highly specialized.

Evidence of whether function is essential may include:

1. Employer's judgment as to which functions are essential.
2. Written job descriptions prepared before advertising or interviewing applicants.

3. Amount of time spent performing the function.
4. Consequences of not performing the function.
5. The terms of a collective bargaining agreement.
6. Work experience of past incumbents in the job.
7. Current work experience of incumbents in similar jobs.

Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Can an employer maintain existing production/ performance standards for an employee with a disability?

An employer can hold employees with disabilities to the same standards of production/performance as other similarly-situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

Can an employer establish specific attendance and leave policies?

An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly-applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requires a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat—i.e., a significant risk of substantial harm—to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of a "direct threat" by a reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically-supportable methods that there is a significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Are applicants or employees who are currently illegally using drugs covered by the ADA?

No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Is testing for the illegal use of drugs permissible under the ADA?

Yes. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully-prescribed drug or other medical information, such information must be treated as a confidential medical record.

Are alcoholics covered by the ADA?

Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Does the ADA override federal and state health and safety laws?

The ADA does not override health and safety requirements established under other federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another federal law, an employer must comply with it and does not have to show that the standard is job-related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another federal law, then the employer must do so.

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a state or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

How does the ADA affect workers' compensation programs?

Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

What is discrimination based on "relationship or association" under the ADA?

The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

How are the employment provisions enforced?

The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin, and religious discrimination under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated state human rights agencies. Available remedies will include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

What are an employer's record keeping requirements under the employment provisions of the ADA?

An employer must maintain records such as application forms submitted by applicants and other records related to hiring, requests for reasonable accommodation, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the charge.

Does the ADA require that an employer post a notice explaining its requirements?

The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available for EEOC summarizing the requirements of the ADA and other federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

What resources does the Equal Employment Opportunity Commission have available to help employers and people with disabilities understand and comply with the employment requirements of the ADA?

The Equal Employment Opportunity Commission has developed several resources to help employers and people with disabilities understand and comply with employment provisions of the ADA. Resources include a Technical Assistance Manual that provides "how-to" guidance on the employment provisions of the ADA, a directory to help individuals find specific information, and a variety of brochures, booklets, and fact sheets.

8.3 ADA, Title II: State and Local Governments (Including Public Schools)

Does the ADA apply to state and local governments?

Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. It applies to all state and local governments, their departments and agencies, and any other instrumentalities or special purpose districts of state or local governments. It clarifies the requirements of Section 504 of the Rehabilitation Act of 1973 for public transportation systems that receive federal financial assistance, and extends coverage to all public entities that provide public transportation, whether or not they receive federal financial assistance. It establishes detailed standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK).

When do the requirements for state and local governments become effective?

In general, they became effective on January 26, 1992.

How does Title II affect participation in a state or local government's programs, activities, and services?

A state or local government must eliminate any eligibility criteria for participation in programs, activities, and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for the provision of the service, program, or activity. The state or local government may, however, adopt legitimate safety requirements necessary for safe operation if they are based on real risks, not on stereotypes or generalizations about individuals with disabilities. Finally, a public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate that a particular modification would fundamentally alter the nature of its service, program, or activity, it is not required to make that modification.

Does Title II cover a public entity's employment policies and practices?

Yes. Title II prohibits all public entities, regardless of the size of their work force, from discriminating in employment against qualified individuals with disabilities. In addition to Title II's employment coverage, Title I of the ADA and Section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities.

What changes must a public entity make to its existing facilities to make them accessible?

A public entity must ensure that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible. A state or local government's programs, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to facilities of a public entity that existed on January 26, 1992. Public entities do not necessarily have to make each of their existing facilities accessible. They may provide program accessibility by a number of methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate accessible sites.

Are there any limitations on the ADA's barrier removal requirements for existing facilities?

Yes. Barrier removal need be accomplished only when it is "readily achievable" to do so.

What does the term "readily achievable" mean?

It means "easily accomplishable and able to be carried out without much difficulty or expense."

What are examples of the types of modifications that would be readily achievable in most cases?

Examples include the simple ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

When must structural changes be made to attain program accessibility?

Structural changes needed for program accessibility were to be made no later than January 26, 1995.

What is a self-evaluation?

A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with Title II's requirements. All public entities had to have completed a self-evaluation by January 26, 1993. A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations, but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with Title II's requirements.

What does Title II . equire for new construction and alterations?

The ADA requires that all new buildings constructed by a state or local government be accessible. In addition, when a state or local government undertakes alterations to a building, it must make the altered portions accessible.

How will a state or local government know that a new building is accessible?

A state or local government will be in compliance with the ADA for new construction and alterations if it follows either of two accessibility standards. It can choose either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, which is the standard that must be used for public accommodations and commercial facilities under Title III of the ADA. If the state or local government chooses the ADA Accessibility Guidelines, it is not entitled to the elevator exemption (which permits certain private buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

How will the public accommodations provisions be enforced?

Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized o bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

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Chapter 9

Student Rights and Responsibilities

9.1 Case Law Precedent

How does the U.S. Constitution influence the rights and responsibilities of students?

The First Amendment spells out the constitutional rights of all Americans to freedom of religion, association, speech and press, assembly and petition. The Fourteenth Amendment guarantees the equal protection of the laws and due process of law. The greater the loss of freedom through the operation of a board rule, the more careful the board must be in assuring due process protections to students. School boards may not make rules which are arbitrary, capricious or outside the authority given to them by the legislature. Board rules must stand the test of fairness and reasonableness. While there is no hard and fast definition of what is reasonable, a rule is generally considered so if it utilizes a rational means of accomplishing some legitimate school purpose.

The school board and staff may legally make reasonable and necessary rules governing the conduct of students in school. The rule-making power, however, is not unlimited; it must operate within statutory and constitutional restraints. A board of education has only those powers which are enumerated in the laws of the state, or which are necessarily implied for the orderly operation of the school.

What rights to free expression did the famous 1969 Supreme Court decision guarantee to students?

The right of public school students to freedom of expression was confirmed in 1969 when the United States Supreme Court held in *Tinker v. Des Moines Sch. Bd.* that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court also stated:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental (inalienable) rights which the state must respect, just as they themselves must respect their obligations to the state. In the absence of a specific showing of Constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.
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> *Tinker v. Des Moines Sch. Bd.*, 393 U.S. 503 (1969)

Like other rights, however, this right is not unlimited. Students have been upheld in wearing freedom buttons and arm bands where such practice was not disruptive of the school's ongoing program. Boards may not interfere solely because they feel a disturbance is possible. When, however, a disturbance has occurred or is imminent, the board may reasonably limit free expression.

9.2 Recent U.S. Supreme Court Decisions

Have recent U.S. Supreme Court decisions limited student rights to free expression?

Yes, in recent U.S. Supreme Court decisions regarding student expression, *Bethel v. Fraser* (1986) and *Hazelwood Sch. Dist. v. Kuhlmeier* (1988), the Court emphasized the rights of school administrators to provide for a positive school climate. The Court sent a clear signal that inappropriate individual expression that negatively influences others will not be constitutionally protected. These decisions give school authorities more discretion in monitoring school-sponsored journalism, plays, and other expression that are part of the curriculum.

What were the circumstances and key elements in the landmark *Bethel v. Fraser* student speech decision?

Matthew Fraser, a student at Bethel High School, gave a speech nominating a friend for student office. His brief speech consisted solely of sexual innuendo, and was delivered to a captive audience of about 600 students, many of whom were 14-year-olds.

The Bethel District in suburban Tacoma, Washington, had a school policy in place prohibiting obscene or profane language and gestures as interfering with the educational process. The student was given a three-day suspension, later negotiated down to two days. The parents, unsatisfied with the proposed punishment, took the matter to federal court claiming that, among other things, Matthew's free speech rights had been abridged. The federal district court addressed the issue of whether Fraser's speech was obscene or merely indecent. The court reasoned that according to the *F.C.C. v. Pacifica Foundation* [Carlin] case, expression rising to the level of "obscene" would contain one or more of the "seven filthy words." Fraser's speech, while clearly indecent, contained innuendo rather than the proscribed, specific words from the *F.C.C.* case.

The Ninth Circuit Court of Appeals (whose jurisdiction includes the state of Nevada) affirmed the district court ruling in a 2-1 decision agreeing that only obscene speech may be regulated, not indecent speech. The appeals court also cited the *Tinker* decision, rejecting the board's authority to control language used to express ideas during a school-sponsored activity.

However, the Ninth Circuit Court of Appeals decision was appealed to the Supreme Court which rendered a 7-2 decision in favor of the Bethel School District. In overturning the decisions of the lower courts, the U.S. Supreme Court ruled that free speech may be limited when speech is sexually explicit, the audience includes children, and/or when the audience is captive. The Court also stated that permitting vulgar and lewd speech would undermine the school's basic mission, which includes "educating our youth for citizenship in public schools" and "teach[ing] by example the shared values of a civilized social order." The Court further stated:

> The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. . . .The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.
>
> A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience

> of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Does the *Fraser* decision negate the earlier *Tinker* ruling?

Regarding the *Tinker* declaration that students do not leave their rights at the schoolhouse gate, the Supreme Court stated that this case differed from *Tinker* because Fraser's speech (and punishment) was unrelated to any political viewpoint. In emphasizing school board and administrative authority to control the educational environment, the Court in *Fraser* ruled that:

> First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.
>
> It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schooi, and the determination of what manner of speech is inappropriate properly rests with the school board.

As Supreme Court decisions are the law of the land, this case had immediate and far-reaching impact. Many cases have used the rationale from the *Bethel v. Fraser* case to further define the limits of student expression. The other major case regarding student expression was *Hazelwood v. Kuhlmeier*.

What authority did the Supreme Court confirm on school administrators in the *Hazelwood* decision?

In Hazelwood, Missouri, a high school principal, believing not enough time existed to properly edit articles he found objectionable, censored two stories in the May 1983, edition of the student newspaper, the Spectrum. One dealt with supposedly anonymous students who were pregnant, and the other identified by name a student who complained of her father's conduct during her parents' divorce. The principal believed the article dealing with teen pregnancy failed to protect the anonymity of the subjects of the article and may have encouraged unsafe sexual practices to a student population that included 14-year-olds. The principal also was concerned that the article on the divorce did not meet ethical journalistic standards as it gave a one-sided view of the father without giving him an opportunity to respond, subjecting the school to a possible libel suit. Suit was brought by some members of the student newspaper staff against the Hazelwood School District, arguing that the principal's actions had violated their First Amendment free speech rights.

Ruling in the school district's favor, the Supreme Court, in a 5-3 decision, declared:

> School administrators have broad discretion to regulate the content of school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur [sanction or approval] of the school.

The paper was reasoned to be school-sponsored because it was part of the school curriculum as a journalism class, supervised by faculty members. Students received grades and academic credit for their participation.

Did the *Hazelwood* decision nullify the *Tinker* ruling?

No, as in the *Bethel v. Fraser* decision, the Supreme Court differentiated this case from the circumstances in *Tinker*:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities.

And, again as in the *Fraser* case, the Court reiterated the importance of the school's educational mission:

> Educators have broad authority to prohibit speech which conflicts with the school's educational mission and assure that
> - Participants learn whatever lessons the activity is designed to teach;
> - Listeners or readers are not exposed to material inappropriate to their maturity level; and
> - Views of individuals are not erroneously attributed to the school district.

Are there recommended guidelines for governing the content of student publications?

Most school officials feel that they are on comfortable legal ground in prohibiting students from publishing and distributing material that:

- Is obscene, according to current community standards.
- Contains profanity—as defined by the community's major newspaper.
- Is libelous or slanderous, or that violates the rights of privacy.
- Advocates breaking any law or violating lawful school regulations.
- Would cause substantial disruption of the orderly operation of the school.
- Criticizes or demeans any individual or group because of race, color, creed, sex, national origin, age, ancestry, or marital status.
- Encourages action that endangers the health and safety of students.

Do the *Fraser* and *Hazelwood* decisions apply to "underground" student press?

No, because student "underground" press is not school-sponsored, school administrators must continue to rely on demonstrated school disturbance and/or libelous content as reasons for disallowing distribution. Courts have frowned on blanket prior review policies, therefore school policies must be carefully constructed and applied on a case-by-case basis. Cases regarding underground student press have been decided based on the unique circumstances present. See *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988).

What is the trend in student expression decisions since the *Fraser* and *Hazelwood* rulings by the U.S. Supreme Court?

The importance and impact of the *Bethel v. Fraser* and *Hazelwood v. Kuhlmeier* cases can hardly be over emphasized. They currently control similar cases in the lower courts and have been the basis for emboldening school boards to formulate new policies, not only in regard to student expression in speech and the arts, but in controlling dangerous student behavior. Three selected cases specifically using the *Fraser* and *Hazelwood* precedent follow:

> *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353 (1987)
>
> A brother and sister decided to attend their high school prom held at the University of Miami of Ohio dressed in each other's clothes (cross-dressed). They were detained at the door by a school administrator who advised them that they would not be allowed to attend the event unless they were dressed appropriately. Despite the admonition, the students proceeded into the prom area and were promptly forced to leave by University of Miami campus police. The students brought suit, claiming their rights to free expression had been denied. Citing *Bethel v. Fraser*, the district court ruled in favor of the school district, finding the school board dress regulations to be "reasonably related to valid educational purposes of teaching community values and maintaining school discipline."
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> *Gano v. School Dist. 411*, 674 F. Supp. 796 (1987)
>
> An entrepreneurial student designed T-shirts with the likeness of three of his school's administrators depicted in an alcoholic stupor. Testing the market by wearing his prototype to school, he was quickly suspended, but vowed to mass produce the product and sell them at an upcoming homecoming celebration. His parents brought suit but the district court upheld the suspension citing the *Fraser* case.
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> *Olesen v. Board of Educ. of Sch. Dist. No. 288.*, 676 F. Supp. 820 (1987)
>
> A male student challenged a school district policy prohibiting males from wearing earrings. The policy had been implemented

> because of gang activity. The school board's written rationale stated that between 1981 and 1985: a) students had been intimidated by gang members both in and around school, b) gang members were attempting to recruit new members in the school buildings, c) many students were afraid of gang members and often reluctant to come to school, and d) acts of violence occurred on school grounds which resulted from warring factions in competing gangs.
>
> The district court held that the school policy did not violate the student's right of free speech and expression nor did it violate equal protection on the grounds that it did not apply to female students.

9.3 Student Management and Discipline

Do school officials have the authority to control student conduct off school grounds?

The authority of the school officials to control student conduct off school grounds and outside school hours is well settled in the law. When students are engaged in a school-sponsored activity, the authority of the school officials is the same as if the activity took place on school property.

A Nevada Attorney General Opinion cited in the Nevada Revised Statutes following Section 392.467 states that:

> [S]chools may promulgate and enforce rules and regulations concerning conduct of students both on and off school property, provided they are directly related to maintenance of order and discipline for legitimate school functions.
>
> AGO 35 (7-26-1971)

Is there a law against detaining and/or intimidating students en route to or from school?

Yes, NRS 392.470 prohibits interference with pupils attending school. It states:

> It is unlawful for any person, against the will of a pupil attending any public school, to beat, whip, detain or otherwise interfere

with him while he is on his way to and from school. Any person who violates any of the provisions of this section shall be guilty of a misdemeanor.

Are there federal guidelines regarding student suspension?

In the landmark 1975 *Goss v. Lopez* case, it was decided that students have sufficient "property interest" entitling them to public education and sufficient "liberty interests" ("reputation" as it affects future economic opportunity) to receive due process. Students must receive due process at all times and the level of due process must increase with length of suspension.

Short-term suspension (typically 1-3 days) requires only an "informal hearing," which may consist of little more than listening to the student's side of the situation. It is recommended, however, that short-term suspension policy include contact with parents and documentation.

Immediate suspension is appropriate (without due process) when there is a danger to persons or property or if disruption of the educational environment is imminent. A hearing must be held as soon as possible in such cases.

Long-term suspensions or expulsions of more than 10 days in length require formal due process, i.e., a formal hearing. Prior to a formal hearing, the school district must adhere to the following general guidelines regarding hearings:

1. Provide student and parent/guardian with written notice of charges including specific school rule(s) violated.
2. Notice must be given including date, time, and place of hearing, allowing sufficient time for student (and counsel) to prepare an adequate defense.
3. The notice must inform the student of all available rights; such as the right to use an attorney, call and cross-examine witnesses, and examine school district evidence.

What notice to students does Nevada law require regarding discipline?

Each school is directed to prescribe written rules of behavior for pupils attending school within their district and must determine appropriate punishments for violations of the rules. Copies of the rules must be distributed to each pupil at the beginning of the school year, to each new pupil who enters during the year, and must also be made available for public inspection at each school location in the district. The legislature has established procedural guidelines for school district student discipline. Local boards are empowered to authorize suspension or expulsion of any student in the district. Typically, students may not be suspended or expelled until they have been given notice of the charges against them, an explanation of the evidence, and an opportunity for a hearing.

May Nevada schools prohibit gang activity, dress, or symbols on school property?

Yes, NRS 392.4635, added in 1995, states:

> 1. The board of trustees of each school district may establish a policy that prohibits the activities of criminal gangs on school property. The policy may prohibit
>   (a) A pupil from wearing any clothing or carrying any symbol on school property that denotes membership in or an affiliation with a criminal gang; and
>   (b) Any activity that encourages participation in a criminal gang or facilitates illegal acts of a criminal gang.
> 2. Each policy that prohibits the activities of criminal gangs on school property may provide for the suspension or expulsion of pupils who violate the policy.
> 3. As used in this section, "criminal gang" has the meaning ascribed to it in NRS 213.1263.

A potential limitation of this statute is that it refers to the activity, dress, and symbolism of only "criminal" gangs. The definition of criminal gang cited in Section 3 above is taken from Nevada statute dealing with conditions of parole. Criminal gang is defined as a formal or informal organization that has a common name or identifying symbol; particular conduct, status, or customs, and which "has as one of its common activities engaging in criminal activity punishable as a felony." The requirement under this definition that a "criminal gang" engages in activities resulting in felony charges greatly narrows the scope of this statute (NRS 213.1263 § 2(C)).

How are successful policies written to control gang activity?

The policy must fit the problem. School districts with proven gang problems have met with legal success by writing policies that emphasize the negative consequences of gang activity on their student body and school climate. For example, in *Olesen v. Board of Educ. of Sch. Dist. No. 288*, the district won a federal court case upholding a school-wide ban on jewelry frequently worn by gang members. The school district demonstrated to the court's satisfaction that their high level of gang activity required greater sanctions than schools with lesser activity. Their policy specifically stated that:

- Students had been intimidated by gang members both in and around school. Gang members were attempting to recruit new members in the school buildings.
- Many students were afraid of gang members and often reluctant to come to school.
- Acts of violence occurred on school grounds which resulted from warring factions in competing gangs.

Olesen v. Board of Educ. of Sch. Dist. No. 288,
676 F. Supp. 820 (1987)

How does the federal Gun-Free Schools Act apply to student discipline?

The Gun-Free Schools Act states that each state receiving federal funds shall have in effect a state law requiring local educational agencies to expel from school for not less than one year a student who brings a firearm to school under the jurisdiction of local educational agencies in that state, except that the state law must allow the local educational agency's chief administering officer to modify the expulsion requirement for a student on a case-by-case basis.

The Gun-Free Schools Act specifically states that the Act must be interpreted in a manner consistent with IDEA. The discipline of special education students is addressed in Chapter 9 of this text.

What do Nevada statutes mandate regarding student suspension/expulsion for possession of firearms (or other dangerous weapons), controlled substances, or injuring school employees?

In response to the Gun-Free Schools Act of 1994, the Nevada legislature added language that covered the possession of firearms, other dangerous weapons and controlled substances while on public school premises. State and local compliance with federal acts are necessary to ensure continuance of federal funds. The revised statute (392.466), as amended in 1997, read as follows:

> 1. Except as otherwise provided in this section, any pupil who commits a battery which results in the bodily injury of an employee of the school, sells or distributes any controlled substance or is found in possession of a dangerous weapon, while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be suspended or expelled from that school, although he may be placed in another kind of school, for at least a period equal to one semester for that school. For a second occurrence, the pupil must: (a) Be permanently expelled from that school; and (b) Receive equivalent instruction authorized by the state board pursuant to NRS 392.070.
>
> 2. Except as otherwise provided in this section, any pupil who is found in possession of a firearm while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be expelled from the school for a period of not less than 1 year, although he may be placed in another kind of school for a period not to exceed the period of the expulsion. For a second occurrence, the pupil must (a) Be permanently expelled from the school; and (b) Receive equivalent instruction authorized by the state board pursuant to NRS 392.070.
>
>   The superintendent of schools of a school district may, in a particular case in that school district, allow an exception to the expulsion requirement of this subsection.
>
> 3. Except as otherwise provided in this section, any pupil who is a habitual disciplinary problem as set forth in section 22 of this act must be suspended or expelled from the school for a period equal to at least one semester for that school. For the period of his suspension or expulsion, the pupil must receive equivalent instruction authorized by the state board pursuant to NRAS 392.070.
>
> [Section 22 of AB 376, 1997 defined "habitual disciplinary problem" as follows:

A pupil shall be deemed a habitual disciplinary problem if the school in which the pupil is enrolled has written evidence which documents that in one school year:

1. The pupil has threatened or extorted, or attempted to threaten or extort another pupil, or a teacher or other personnel employed by the school;
2. The pupil has been suspended for initiating at least two fights on school property; or
3. The pupil has a record of five suspensions from the school for any reason.]

4. This section does not prohibit a pupil from having in his possession a knife or firearm with the approval of the principal of the school. A principal may grant such approval only in accordance with the policies or regulations adopted by the board of trustees of the school district.

5. Any pupil in grades 1 to 6, inclusive, except a pupil who has been found to have possessed a firearm in violation of subsection 2, may be suspended from school or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and approved this action in accordance with the procedural policy adopted by the board for such issues.

Are special education students disciplined in the same manner as regular education students?

No. Section 6 of the statute above (NRS 392.466) differentiates the manner in which special education students are disciplined:

6. A pupil who is participating in a program of special education pursuant to NRS 388.520, other than a pupil who is gifted and talented, may, in accordance with the procedural policy adopted by the board of trustees of the school district for such matters, be:
   (a) Suspended from school pursuant to this section for not more than 10 days. Such a suspension may be imposed pursuant to this paragraph for each occurrence of conduct proscribed by subsection 1.
   (b) Suspended from school for more than 10 days or permanently expelled from school pursuant to this section only

> after the board of trustees of the school district has reviewed the circumstances and determined that the action is in compliance with the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 et seq.).

For more detail regarding special education students see Chapter 10 of this text.

How are "dangerous weapon" and "firearm" defined under Nevada student discipline statute?

Section 7 of NRS 392.466 defines "dangerous weapon" and "firearm" as:

(a) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of NRS 200.481.

(b) "Dangerous weapon" includes, without limitation, a blackjack, sling shot, billy, sand-club, sandbag, metal knuckles, dirk or dagger, a nunchaku, switchblade knife or trefoil, as defined in NRS 202.350, a butterfly knife or any other knife described in NRS 202.350, or any other object which is used, or threatened to be used, in such a manner and under such circumstances as to pose a threat of, or cause, bodily injury to a person.

(c) "Firearm" includes, without limitation, any pistol, revolver, shotgun, explosive substance or device, and other item included within the definition of a "firearm" in 18 U.S.C. § 921.

What defines a "habitual truant" and how is this problem addressed in Nevada?

Nevada school boards are required to create advisory boards to review school attendance. Building principals are required to report to law enforcement agencies names of students who are habitual truants. A habitual truant is defined as a student who has accumulated three or more unexcused absences from school. The law enforcement agency conducts an investigation and if a student is confirmed to be a habitual truant, a misdemeanor citation is prepared ordering the truant to appear in juvenile court. Continued truancy may result in the filing of criminal charges against the parent(s)/guardian(s) (AB 486, 1997, amends NRS Chapters 385 & 392).

Are school employees to be notified of the presence of dangerous students?

The 1997 Nevada legislature added protections from violent students for students and teachers by requiring courts to inform schools and schools to inform employees of the presence of students who have demonstrated violent or dangerous behavior. Because of confidentiality requirements, students themselves are not directly informed of the presence of such students. For a full text of this law, see the Teacher Rights chapter of this manual, section entitled *Protection from Violent Students* (AB 518, 1997 amending NRS Chapters 62, 200, & 392).

Nevada law also ensures that school officials are notified regarding juveniles who have committed sexual offences (including attempted sexual offences). Such juveniles are not to attend the same school as their victims (SB 102, 1997 amending NRS Chapter 62).

What federal law governs student search and seizure?

The Fourth Amendment protects citizens from unreasonable searches. Law enforcement officers must have sufficient reason or "probable cause" to invade a person's right to privacy. They must, for example, convince a judge that their reasons are sufficient to obtain search warrants, which according to the Fourth Amendment must specify what is sought and where it will be found.

Teachers and school personnel are not held to the same standard as law enforcement officers; the standard for schools is "reasonable suspicion." In *Bellnier v. Lund*, a New York District Court noted that although the standard of "reasonable suspicion" is a lower standard than that of "probable cause" required for police officers to obtain a warrant, it is not so unrestrictive as to place no restraint on school personnel.

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the U.S. Supreme Court established the prevailing precedent regarding school searches and seizures. The Court determined that the Fourth Amendment did apply to schools and in order for searches to be constitutionally permissible, reasonableness must prevail. The Court noted two requirements for an acceptable search. The first is whether the search is initially justified by reasonable suspicion. The second is whether the methods used in the search are reasonably related to the objectives of the search and not excessively intrusive. In other words body searches for stolen milk money may be unreasonable and excessively intrusive considering the relatively insignificant object of the search.

Recently, courts have been more receptive to searches when the items sought pose an immediate danger to students, such as concealed weapons and drugs.

Is random drug testing permitted?

The U.S. Supreme Court in the 1995 *Vernonia Sch. Dist. 47J v. Acton* case upheld, in a 6-3 decision, an Oregon school district's policy requiring students wishing to compete in interscholastic athletics to agree to random urine testing for the presence of illegal drugs. In doing so, the Court conceded that such testing constituted a search, and went beyond the *New Jersey v. T.L.O.* decision in ruling that "reasonable suspicion" need not be individualized. The majority opinion in this case made it clear that a random testing policy like Vernonia's would be limited to schools showing evidence of a drug problem. The legal counsel for the National Association of Secondary School Principal (NASSP) opined, "It is likely that such a policy would be permissible only where limited to students involved in sports, in which there is a greater risk of physical injury if a student is on drugs and expectations of privacy are reduced by the normal locker room environment."

Can Nevada's students carry portable telephones on school premises?

Students may not carry or possess "beepers," portable telephones or any other similar electronic device designed to page or contact others without written authorization from a school administrator (NRS 392.500).

Can students be compelled to salute or pledge allegiance to the flag?

Since the 1943 U.S. Supreme Court decision in *West Virginia State Bd. of Educ. v. Barnette*, school policies insisting on mandatory participation in school flag salute exercises have been unconstitutional. A federal appeals court ruled in *Goetz v. Ansell* that forcing options on students such as leaving the classroom or standing silently during the pledge of allegiance was a benign form of punishment for nonparticipants. The court ruled that to compel students to stand in silence was to compel an act of acceptance to the pledge over the student's deeply held and contrary convictions.

This does not mean that schools cannot compel proper decorum and appropriate behavior during such exercises. It simply means that students may not be coerced to participate or punished in any way for their nonparticipation.

Is corporal punishment or the use of "reasonable force" allowed in Nevada's public schools?

The U.S. Supreme Court in the 1977 *Ingraham v. Wright* decision ruled that corporal punishment occurring in public schools was not "cruel and unusual punishment" as prohibited by the Eighth Amendment of the Constitution. The decision left the issue in the hands of state legislatures.

NRS 392.465 (1993) ended the practice of corporal punishment in the state of Nevada's public schools. The law reads as follows:

1. Corporal punishment may not be administered upon a pupil in any public school.
2. Subsection 1 does not prohibit any teacher, principal or other licensed person from defending himself if attacked by a pupil.
3. As used in this section, "corporal punishment" means the intentional infliction of physical pain upon or the physical restraint of a pupil for disciplinary purposes. The term does not include the use of reasonable and necessary force:
    (a) To quell a disturbance that threatens physical injury to any person or the destruction of property;
    (b) To obtain possession of a weapon or other dangerous object within a pupil's control;
    (c) For the purpose of self-defense or the defense of another person; or
    (d) To escort a disruptive pupil who refuses to go voluntarily with the proper authorities.

NRS 392.465

May schools require students to wear uniforms or teachers to follow dress codes?

A bill allowing school districts to adopt policies requiring students to wear uniforms and/or teachers to follow dress codes was passed by the 1997 Nevada legislature. The law reads as follows:

1. The board of trustees of a school district may, in consultation with the schools within the district, parents and legal guardians of pupils who are enrolled in the district, and associations and organizations representing licensed educational personnel within the district, establish a policy that requires pupils to wear school uniforms.
2. The policy must
   - (a) Describe the uniforms;
   - (b) Designate which pupils must wear the uniforms; and
   - (c) Designate the hours or events during which the uniforms must be worn.
3. If the board of trustees of a school district establishes a policy that requires pupils to wear school uniforms, the board shall facilitate the acquisition of school uniforms for pupils whose parents or legal guardians request financial assistance to purchase the uniforms.
4. The board of trustees of a school district may establish a dress code enforceable during school hours for the teachers and other personnel employed by the board of trustees.

NRS Chapter 392 (as amended by AB 376, 1997)

9.4 Student Records

What major federal law provides guidelines regarding the release of student records?

The Family Educational Rights and Privacy Act (20 USC § 1232g), better known by the acronym FERPA, and also referred to as the Buckley Amendment, was enacted in 1974. Prior to 1974 student records were often assumed to be "off limits" to parents.

Although portions of the Act were incorporated into the Education for All Handicapped Children Act of 1975 (now IDEA) and are frequently referenced in special education regulations and guidelines, FERPA primarily applies to all students (regular and special education) attending institutions that receive federal financial assistance.

FERPA gives parents (as well as students in postsecondary schools) the right to review and confirm the accuracy of education records. This and other United States "privacy" laws ensure that information about citizens collected by schools and government agencies can be released only for specific and legally defined purposes. Since enacting FERPA, Congress has strengthened privacy safeguards of education records through this law, refining and clarifying family rights and agency responsibilities to protect those rights.

FERPA applies to public schools and state or local education agencies that receive federal education funds, and it protects both paper and computerized records. In addition to the federal laws that restrict disclosure of information from student records, most states also have privacy protection laws that reinforce FERPA. State laws can supplement FERPA, but compliance with FERPA is necessary if schools are to continue to be eligible to receive federal education funds.

FERPA requires schools and local education agencies to annually notify parents of their rights under FERPA. The notice must effectively inform parents with disabilities or who have a primary home language other than English. The annual notice pertaining to FERPA rights must explain that parents may inspect and review records and, if they believe the records to be inaccurate, they may seek to amend them. Parents also have the right to consent to disclosures of personally identifiable information in the record, except under authorized circumstances.

FERPA gives both parents, custodial and noncustodial, equal access to student information unless the school has evidence of a court order or state law revoking these rights. When students reach the age of 18, or when they become students at postsecondary education institutions, they become "eligible students" and rights under FERPA transfer to them. However, parents retain access to student records of children who are their dependents for tax purposes.

What is the definition of an education record?

Education records include a range of information about a student that is maintained in schools in any recorded way, such as handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. Examples are:

- Date and place of birth, parent(s) and/or guardian addresses, and where parents can be contacted in emergencies;
- Grades, test scores, courses taken, academic specializations and activities, and official letters regarding a student's status in school;
- Special education records;

- Disciplinary records;
- Medical and health records that the school creates or collects and maintains;
- Documentation of attendance, schools attended, courses taken, awards conferred, and degrees earned;
- Personal information such as a student's identification code, social security number, picture, or other information that would make it easy to identify or locate a student.

What records are not considered education records?

Personal notes made by teachers and other school officials that are not shared with others are not considered education records. Additionally, law enforcement records created and maintained by a school or district's law enforcement unit are not education records.

What is "directory information"?

Part of the education records, known as directory information, includes personal information about a student that can be made public according to a school system's student records policy. Directory information may include a student's name, address, telephone number, and other information typically found in school yearbooks or athletic programs. Other examples are names and pictures of participants in various extracurricular activities or recipients of awards, pictures of student, and height and weight of athletes.

Each year schools must give parents public notice of the types of information designated as directory information. By a specified time after parents are notified of their review rights, parents may ask to remove all or part of the information on their child that they do not wish to be available to the public without their consent.

May parents appeal the content of student records?

If, upon review, parents find an education record is inaccurate or misleading, they may request changes or corrections, and schools and education agencies must respond promptly to these requests.

Requests should be made in writing, according to an agency's annual notice of procedures for exercising rights to amend records. Within a reasonable time period, the school or agency must decide if the request to change a record is consistent with its own assessment of the accuracy of the record. If a parent's request is denied, he or she must be offered the opportunity for a hearing. If the disagreement with the record continues after the hearing, the parent may insert an explanation of the objection in the record. FERPA's provisions do not apply to grades and educational decisions about children that school personnel make.

While parents have a right to review records, schools are not required by federal law to provide copies of information, unless providing copies would be the only way of giving parents access. Schools may charge a reasonable fee for obtaining records, and they may not destroy records if a request for access is pending.

How is disclosure of student records restricted?

Local education agencies and schools may release information from students' education records with the prior written consent of parents, under unlimited conditions specified by law, or as stated in local agencies' student records policies. The same rules restricting disclosures apply to records maintained by third parties acting on behalf of schools, such as state and local education agencies, intermediate administrative units, researchers, psychologists, or medical practitioners who work for or are under contract to schools.

If an education agency or a school district has a policy of disclosing records, it must specify the criteria for determining school officials within an agency, including teachers, who have a legitimate educational interest. Generally, school officials have legitimate educational interest if they need to review an education record to fulfill their professional responsibilities.

Teachers and school officials who work in schools to which students apply for entrance may also have access to education records without prior consent of the parent. In addition, information from students' records may be released to state and local education officials to conduct audits or to review records in compliance with federal laws. Schools may also disclose information from education records without the consent of parents in response to subpoenas or court orders. A school official must make a reasonable effort to notify the parent before complying with the subpoena unless the subpoena is issued to enforce a law and specifies not to notify the parent. In emergencies, school officials can provide information from education records to protect the health or safety of the student or others.

There are cases when schools or school systems decide it is in the public interest to participate in policy evaluations or research studies. If student records are to be released for these purposes, the school or school system must obtain prior consent of the parent. Signed and dated written consent must:

- Specify the records that will be released;
- State the reason for releasing the records;
- Identify the groups or individuals who will receive the records.

In general, information about each request for records access and each disclosure of information from an education record must be maintained as part of the record until the school or agency destroys the education record. Outside parties receiving records must receive a written explanation of the restrictions on the re-release of information.

In 1994, the Improving America's Schools Act amended several components of FERPA, tightening privacy assurances for students and families. The amendments apply to the following key areas:

- Parents have the right to review the education records of their children maintained by state education agencies;
- Any third party that inappropriately re-releases personally identifiable information from an education record cannot have access to education records for five years;
- Information about disciplinary actions taken against students may be shared, without prior consent of the parent, with officials in other education institutions;
- Schools may release records in compliance with certain law enforcement judicial orders and subpoenas without notifying parents.

Adapted from the U.S. Department of Education publication *Protecting the Privacy of Student Education Records*, January 1997.

Nevada statutes require public school officials to comply with federal law governing the release of information from student records (NRS 392 as amended by SB 168, 1997).

9.5 Student Privacy

What is the "Hatch Amendment" and what protections does it provide to students?

In 1978, Congress enacted the Protection of Pupil Rights Act which included the amendment sponsored by Senator Hatch. The Hatch Amendment retained the protection of parents' rights to examine instructional materials in experimental programs and further required parental consent before students participated in federally supported programs involving psychiatric or psychological examination, testing, or treatment designed to reveal information in specified sensitive areas pertaining to personal beliefs, behaviors, and family relationships.

The Department of Education's regulations broadly define psychiatric or psychological examination or treatment as including activities that are not directly related to academic instruction and are designed to obtain personal information or affect behaviors or attitudes. The Department is charged with reviewing complaints under this law; if an educational institution is found in violation and does not comply within a reasonable period, federal funds can be withheld.

After the Hatch Amendment's regulations became effective in 1984, this previously obscure provision became extremely controversial, pitting conservative parents groups against professional education associations. The dispute did not focus on the protection of students' rights in research and experimental programs, but rather on ambiguities in the regulations regarding the scope and intent of the amendment and the federal government's role in resolving curriculum complaints. (*Public School Law*, Third Edition, M. McCarthy and N. Cambron-McCabe, Boston: Allyn and Bacon, 1992)

In 1994, Goals 2000 legislation included the Grassley Amendment which allows advance parental review of all survey and evaluation materials from programs administered by the Department of Education (20 USC § 1232g(c), 1996).

Does the Hatch Amendment impact Nevada public schools?

The 1997 Nevada legislature (SB 168, 1997) amended NRS Chapter 392 adopting the provisions of FERPA and the Hatch Amendment. It included the following restrictions on public schools:

If a public school administers a program which includes a survey, analysis or evaluation that is designed to elicit the information described in 20 USC § 1232h [Hatch Amendment], it must comply with the provisions of that section.

What communication must teachers and counselors keep confidential?

Nevada law regarding teacher/student and counselor/student privileged communication and nondisclosure is excerpted below:

NRS 49.291 Teacher and pupil.

1. As used in this section, "teacher" means a person who is regularly employed by a public or private school in this state as a teacher or administrator and who holds a valid license issued by the superintendent of public instruction authorizing the holder to teach or perform administrative functions in schools.
2. Communications by a pupil to a teacher concerning the pupil's possession or use of drugs or alcoholic beverages made while the teacher was counseling or attempting to counsel the pupil are privileged communications and the teacher must not, without the consent of the pupil, be examined as a witness concerning any such communications in any civil or criminal action to which the pupil is a party.

NRS 49.290 Counselor and pupil.

1. As used in this section, "counselor" means a person who is regularly employed by a public or private school in this state as a counselor, psychologist or psychological examiner for the purpose of counseling pupils, and who holds a valid certificate issued by the superintendent of public instruction authorizing the holder to engage in pupil counseling.
2. Except for communications relating to any criminal offense the punishment for which is death or life imprisonment, communications by a pupil to a counselor in the course of counseling or psychological examination are privileged communications, and a counselor shall not, without the consent of the pupil, be examined as a witness concerning any such communication in any civil or criminal action to which such pupil is a party.

What about reporting child abuse?

Nevada law aimed at protecting children from abuse and neglect is an exception to the above communication law as it specifically requires school psychologists, alcohol or drug abuse counselors (and other counselors), social workers, nurses, teachers, and administrators to report to a protection or law enforcement agency.

Nevada law states that abuse or neglect must be immediately reported if one knows or has reason to believe that a child has been abused or neglected. The statute defines abuse or neglect of a child as

1. Physical or mental injury of a nonaccidental nature.
2. Sexual abuse or sexual exploitation.
3. Negligent treatment or maltreatment of a child caused or allowed by a person responsible for the child's welfare ("person" is broadly defined, including even those "regularly found in the same household as the child").

NRS Chapter 432

Chapter 10

Special Education

10.1 Early Case Law

What led to the recent emphasis on rights for children with special needs?

As early as 1955, a year after the famous *Brown v. Board of Educ.* decision, the Council for Exceptional Children's journal made a case for ending the segregation of the disabled. National advocacy organizations became stronger, hiring lobbyists who had a significant impact on the thinking and political behavior of policy makers in Washington, D.C.

Despite these apparent gains for the cause of equity and accommodation for the disabled, writers put the total number of school-aged children served in the 15 to 20 percent range as late as 1963. Many children with intelligence quotients (I.Q.s) measuring below 50 were still considered "trainable" rather than "educable." It meant that since they could be trained to accomplish only such life skills as feeding and toileting themselves, they should be placed in a segregated training institution apart from the educable children who could benefit from traditional classroom education.

A few states and many individual schools made serious strides in mainstreaming free of government mandates, but it was undoubtedly the two class action cases (*Mills* and *PARC*) that brought rapid change.

What federal cases represent the foundation of current special education law?

The *Mills v. Board of Educ. of the District of Columbia* and *Pennnsylvania Ass'n for Retarded Children v. Commonwealth of Penn.* cases of the early 1970s laid the foundation upon which our current special education law has been built. These cases represented successful efforts at challenging segregated, inconsistent, or nonexistent programs for educating children with disabilities. They brought state practices under federal judicial scrutiny with an appeal to the Fourteenth Amendment's due process and equal protection clauses. These cases represented an action not only on behalf of a few isolated students with disabilities, but for an entire class of students (all similarly situated students in the District of Columbia and the state of Pennsylvania respectively).

Plaintiffs' demands included:

a. A free appropriate education,
b. An Individualized Education Program (IEP), and
c. Due process procedures.

One of these cases resulted in a court-approved settlement. In terms of results plaintiffs were thoroughly successful in both actions. Certainly a foundation for future federal legislation had been laid.

In 1975 the Education for All Handicapped Children Act (EAHCA), better known by its public law number 94-142, was passed. In 1990, when reauthorized, it was retitled the Individuals with Disabilities Education Act (IDEA). This law incorporated many of the provisions won in earlier cases and through legislation. The law's key points are summarized below:

- All children with disabilities must be educated.
- Education must be provided in the least restrictive placement.
- Education must be individualized and appropriate to the child's unique needs.
- It must be provided at no cost to parents.
- Procedural protections are required to ensure that the requirements are met (such as parental notification, participation, consent, or possible hearing).

Regarding education in the least restrictive environment, the law stated (in 1975 language):

> . . .[T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, [should be] educated with children who are not handicapped, and that separate schooling, or other removal of handicapped children from the regular educational environment [should] occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . .
>
> 300.500 20 USC 1412(5)(B)

10.2 Eligibility

How does IDEA define "children with disabilities"?

IDEA Regulations (Subpart A) defines the term "children with disabilities" as those children evaluated in accordance with §§ 300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedical impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

The term "children with disabilities" for children aged 3 through 5 may, at a State's discretion, include children —(i)who are experiencing developmental delays, as defined by the state and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (ii) who, for that reason, need special education and related services.

The terms used in this definition are defined as follows:

> **Autism** means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance, as defined in paragraph (b)(9) of this section.
>
> **Deaf-blindness** means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.
>
> **Deafness** means a hearing impairment that is so severe that the child is impaired in processing linguistic information through

hearing, with or without amplification, that adversely affects a child's educational performance.

Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of "deafness" in this section.

Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

Multi-disabilities means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

Other health impairment means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, that adversely affects a child's educational performance.

Serious emotional disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects the child's educational performance:

  (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
(c) Inappropriate types of behavior or feelings under normal circumstances;
(d) A general pervasive mood of unhappiness or depression; or
(e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

Speech and language impairment means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

> **Visual impairment** including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

Modified from 34 CFR Ch. 300.7, 7-1-97 Edition,
Authority 20 USC 1401(a)(1)

What is "Section 504" and who is eligible?

On the heels of the legal decisions cited in the previous section, legislation was introduced in Congress to eliminate discrimination against persons with disabilities both in the public and private sector. In 1973, the Vocational Rehabilitation Act was passed. Section 504 of the Act states:

> No otherwise qualified person with a disability in the United States ... shall ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 504 applies to all agencies receiving federal funds. These funds may be forfeited if discrimination is substantiated.

See Chapter 8, Section 1, addressing employment concerns for a more detailed treatment of the requirements and protections available under this law. See Appendix D for selected court rulings interpreting Section 504.

What are the major differences in eligibility under IDEA, Section 504, and ADA?

States receiving IDEA funds must make a free appropriate public education (FAPE) available to all children with specified disabilities in mandated age ranges. The IDEA defines children with disabilities as those:

> [W]ith mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, need special education and related services.20 USC § 1401(1)(A)

Federal financial assistance to states under IDEA is generated based on an annual child count of children with disabilities receiving special education and related services. Regardless of the amount of a state's grant, each state receiving IDEA funds and its local school districts must make FAPE available to all resident children within the state's mandatory FAPE age range. Under IDEA, FAPE means special education and related services provided in conformity with IEPs at no cost to parents.

Section 504 and the ADA contain explicit provisions prohibiting discrimination on the basis of disability, but do not provide federal financial assistance for educational programs. However, states and school districts must meet the requirements of these laws as a condition of receiving any federal financial assistance, including IDEA funds. Title II of the ADA extends Section 504's prohibition against discrimination on the basis of disability to state and local governmental entities. This includes public school districts receiving federal financial assistance as well as entities such as public libraries, whether or not they receive federal funds.

Unlike IDEA's definition of "children with disabilities," which speaks in terms of a child's need for special education and related services because of a specific impairment, Section 504 and the ADA define a "person with a disability" in terms of a physical or mental impairment that substantially limits one or more of a person's major life activities, which include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (34 CFR § 104.3(j)(2)(ii).

These differences in definitions mean that there may be students who qualify for regular or special education and related services under Section 504 but who do not have one of the disabilities recognized by IDEA. For example, there are students with drug addictions or alcoholism undergoing treatment for these addictions who are not eligible for services under IDEA but who may be covered by Section 504 and ADA. Many students identified with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD) who do not qualify under IDEA as "other health impaired," etc., qualify under Section 504 of the Rehabilitation Act.

See Appendix D for sample rulings by the Office for Civil Rights (OCR) regarding students protected under Section 504.

When state laws or regulations differ from federal laws or regulations, which "take precedence"?

States receiving IDEA funds must ensure that their regulations are consistent with the requirements of the federal laws and regulations, but there is no requirement that state regulations use terminology that is identical to the language of the federal regulations. When there are differences, the determination of which regulations would take precedence would depend on the particular facts and circumstances. For example, if the state regulation creates a stricter standard of compliance than the federal regulation under IDEA, or supplements the federal regulation, but does not conflict with the federal regulation, the state regulation would control. In contrast, if the standard in the state regulation is less stringent, the state must conform its law to the federal standard in order to receive IDEA funds.

10.3 IDEA Requirements

What is an "IEP" and what are its requirements?

The Individualized Education Program (IEP) is a personalized, written plan specifically designed for each child. It has often been referred to as the centerpiece of the special education delivery system, which is developed in concert with a district representative, the child's teachers, the child's parents, and if appropriate, the child. Mandatory elements of an IEP include the following:

a. Performance assessment: a statement of the child's present educational performance;
b. Goals and objectives: a statement of annual goals and short-term instructional objectives;
c. Services and participation: a statement of specific educational services to be provided and the extent to which the child will not be able to participate in regular educational programs;
d. Transition services: a statement of needed transition services, including, when appropriate, a statement of inter-agency responsibilities with regard to services to be rendered when the student leaves the school setting;
e. Time line for services: a statement of the projected initiation and duration of services; and
f. Criteria for measuring success: a statement of appropriate criteria and procedures for determining, at least annually, whether instructional objectives are being or have been achieved.

The IEP must be in effect prior to the provision of special education or related services. The student's educational placement must be based on the IEP and therefore cannot be determined prior to completion of the IEP. IEP meetings provide an opportunity for parents, teachers, and other knowledgeable individuals to discuss the student's special educational needs and make decisions about the program and services that the student will receive. For students receiving special education and related services for the first time, IDEA requires that the IEP meeting must be held within 30 calendar days of a determination that the student needs special education and related services. Each student's IEP must be implemented as soon as possible following the IEP meeting, that is, immediately following the meeting, except during the summer or a vacation period, or in circumstances that require a short delay, such as the need to arrange transportation.

When must IEP meetings occur?

The school district is responsible for initiating and conducting meetings to develop or review each student's IEP periodically, and if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year. While it is the responsibility of the school district to initiate and conduct IEP reviews, meetings must be scheduled at a time and place mutually agreed upon by the parents and school district to ensure that the parents have the opportunity to attend.

Who must legally be involved in an IEP meeting?

Required participants at all IEP meetings must include at least one regular education teacher (if the child is or might be participating in the regular education environment); at least one special education teacher; an agency (usually school district) representative knowledgeable about general curriculum and availability of resources; an individual who can interpret evaluation results; and, at the parents' or agency's discretion, other individuals with knowledge/expertise about the child, including related services personnel (IDEA Reauthorization Amendments, § 614(d)(b)). The public agency must ensure that the child's parents have the opportunity to participate in IEP meetings. The student with a disability may also attend if determined appropriate.

What steps must a public agency take to ensure parental participation in IEP meetings?

The public agency shall notify the parents of the meeting early enough to ensure that they will have an opportunity to attend and schedule the meeting at a mutually agreed upon time and place. The notice must indicate the purpose, time, and location of the meeting and who will be in attendance. If a purpose of the meeting is the consideration of transition services for a student, the notice must also indicate this purpose, indicate that the agency will invite the student, and identify any other agency that will be invited to send a representative. If neither parent is able to attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

The public agency must also ensure that parents who attend IEP meetings understand the proceedings which may include arranging for an interpreter for parents with deafness or those whose native language is other than English.

Can an IEP meeting be convened without parental participation?

A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. However, the public agency must provide detailed documentation (i.e., correspondence copies, phone records, records and results of visits to parent's home or place of employment, etc.) that attempts were made to ensure parental participation.

Who controls the decisions made at IEP meetings?

IDEA contemplates that decisions made at IEP meetings are team decisions. Therefore, there is no one person on a student's IEP team who has the ultimate authority to dictate the services that an individual student receives.

Must special education students participate in academic assessments?

The 1997 amendments to IDEA require school districts to give students with disabilities the opportunity to participate in state and district-wide assessments or explain the reasoning for their exclusion. IEPs must outline how a child's disability affects his or her performance in the general education curriculum, and must explain nonparticipation in the regular education curriculum. IDEA Reauthorization Amendments, 1997, § 614(d)

What recourse does a teacher, parent, or district representative have when they disagree with the decision made by the IEP committee?

There is no provision in federal law for an educator to file a minority report or dissenting opinion in connection with an educational decision with which he or she disagrees. Any decision made at an IEP meeting should represent the decision of the IEP team, including the child's parents. Under IDEA, parents and public educational agencies have the right to initiate an impartial due process hearing on matters regarding the identification, evaluation, educational placement, or the provision of a free appropriate public education to a child, including educational decisions resulting from IEP meetings. Therefore, if the parents agree with the concerns expressed by the educator and disagree with their child's IEP, the parents may choose to initiate a due process hearing. Similarly, if the school district believes that the IEP team's decision did not properly reflect the needs of the student, the school district could also initiate such a hearing.

Does federal law require that placement decisions be revisited? How often?

Under IDEA, each student's placement, among other factors, must be determined at least annually and must be based on the student's IEP. Since each student's IEP must be based on the student's unique educational needs, it is the student's IEP that forms the basis for the placement decision. However, a student's IEP cannot be revised without holding another IEP meeting, which the school district is responsible for convening.

Can a teacher or parent cause a child's placement decision to be reviewed in terms of its "appropriateness"?

If a teacher wishes to initiate review of the student's IEP at a point during the school year that does not correspond with the annual IEP review, that individual can request the school district to hold another IEP meeting. Similarly, parents of a student with a disability have the right to request an IEP meeting at any time. At the meeting, if the student's IEP team determines that revisions in the IEP should be made, a proposal to change the student's placement may be necessary to reflect the revised IEP.

What level of services are required under special education law?

In *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley* (1982), the first major United States Supreme Court special education decision, the Court ruled that the term "free and appropriate public education" does not require that children be educated "to reach their full potential." The Court stated that the Congressional intent of PL 94-142 was to provide an "open door" of opportunity or a "floor of opportunity" for students with disabilities to receive "some" services, but not to guarantee a particular level of service. They stated that the purpose of the law was to confer a benefit not "maximize the potential" of each child. It must be noted that the school district in this case clearly made a good faith effort at providing an appropriate placement for the child, which in this case was a full-time placement in the regular classroom. The district also was careful to provide appropriate aides and services to ensure that the student was "achieving educational, academically, and socially." The parents brought suit in this matter because they believed that a sign language interpreter would also be beneficial as an additional service to the student despite the fact that during a trial period the interpreter and other experts deemed such provision unnecessary.

In *Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (1986), the Fifth Circuit Court of Appeals, deciding whether or not year-round services were appropriate for a child, ruled that the reference to "some" services (in the *Rowley* decision) does not mean services just above a "virtual standstill." In this case testimony was split between current district employees who testified that no significant regression would occur without summer programming for the student, and testimony by doctors, therapists, and other professionals arguing that continuous extended programming was required to prevent significant regression. The child, in this case, was awarded extended services.

What are "related services"?

The term "related services" is defined as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training" (34 CFR § 300.16(a)).

What if school districts lack resources to provide services?

Under IDEA, lack of adequate personnel or resources does not relieve school districts of their obligations to make a free appropriate public education available to students with disabilities. Furthermore, school districts may not make placements based upon factors such as:

- The configuration of the delivery system,
- The availability of educational or related services,
- Availability of space, or
- Administrative convenience.

10.4 Placement

What is the "least restrictive environment" mandate?

The Education for All Handicapped Children Act (now IDEA) has always advocated that children with disabilities be educated with children who are not disabled whenever possible. In 1975, the law stated:

> [T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, [should be] educated with children who are not handicapped, and that separate schooling, or other removal of handicapped children from the regular educational environment occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Recent inclusion cases such as the *Oberti* decision and the *Holland* case from the Sacramento Unified School District, (decided by the Ninth Circuit Court of Appeals), reemphasized the original mandate for educating all children with disabilities in the regular classroom to the maximum extent appropriate or possible. The language of these cases clearly assumes that students will be part of the regular education classroom with nondisabled peers unless strong reason exists to place them in a more restrictive environment.

In determining placement, supplemental aids and services must be considered. The following quotes from the *Oberti* decision are instructive:

> We construe IDEA's mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily.
>
> In addition, if placement outside of a regular classroom is necessary for the child to receive educational benefit, the school may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with nondisabled children whenever possible.
>
> *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993) citing
> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)

To determine whether a child with disabilities can be educated satisfactorily in a regular classroom with supplemental aids and services, the following factors must be considered:

> 1) whether the district has made reasonable efforts to accommodate the child in the regular classroom; 2) the educational benefits available to the child in the regular classroom, with the use of appropriate supplementary aids and services; and 3) the possible negative effects of the child's inclusion on the other students in the class.
>
> *Oberti v. Board of Educ.*, 995 F.2d 1204 (3rd Cir. 1993)

IDEA also requires school officials to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 CFR § 300.551(a)

The question as to whether to educate a child with disabilities in the regular classroom or place him or her in a special education environment is necessarily an individualized, fact specific inquiry. And in each case, the apparent tension between IDEA's clear preference for mainstreaming and its requirement that schools provide individualized programs tailored to the specific needs of each child with disabilities must be balanced. (Adapted from headnote 7, *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995), citing IDEA §§ 602, 614(a)(5), as amended, 20 USCA §§ 1401, 1414(a)(5).)

What is meant by "supplementary aids and services"?

Some examples of "supplementary aids and services" to be used in the regular classroom cited in recent court decisions include the use of itinerant teachers trained in aiding students with specific disabilities, modification of the regular curriculum to accommodate special needs, behavioral management programs, and special education training and consultation for the classroom teacher, as well as the use of computer-assisted devices and the provision of note takers.

Recent court decisions have determined that separating students with disabilities from the regular classroom should "occur only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Note that this language is a direct quotation from the original language of 94-142 cited earlier. However, with the support of recent federal case law, educators will be legally accountable to ensure that each student is mainstreamed to the "maximum extent appropriate," i.e., whether the school is including the child with nondisabled children whenever and wherever possible. Courts have also put schools on notice that the mere presence of students with disabilities in the regular classroom does not meet the mainstreaming standard.

Have recent court decisions placed more importance on the social rather than academic benefits to students?

Early "inclusion" decisions adopted the rationale of psychologists and others serving as expert witnesses regarding the social benefits achieved by the interaction between disabled and nondisabled students. This emphasis was evident in the following citations:

> The court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers. . . . [A] child may be able to absorb only a minimal amount of the regular education program, but

> may benefit enormously from the language models that his nonhandicapped peers provide.
>
> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)

> Language and role modeling from association with nondisabled peers are essential benefits of mainstreaming.
>
> *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991)

> Benefits obtained by children with mental retardation as the result of placement in a regular classroom include the development of social and communication skills and generally improved self-esteem.
>
> *Sacramento City Unified Sch. Dist. v. Holland* 14 F.3d 1398 (9th Cir. 1994)

More recent legal decisions, particularly in the Ninth Circuit Court of Appeals (which has jurisdiction over Nevada), have weighed the academic benefit to students and the possible negative effects of mainstreaming on the classroom climate as equally important considerations for determining placement. The court recognized the balance necessary between IDEA's preference for placement in the regular classroom and the mandate to meet the unique needs of children with disabilities. See other references in this chapter to *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398 (9th Cir. 1994), *Clyde K. and Sheila K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9th Cir. 1994), and *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995).

Can a school district receive assistance for out-of-district placements?

When a school district is unable to provide an appropriate special education program and related services for a particular disability (e.g., a student requiring full-time residential treatment), the board may make application to the superintendent of public instruction. The state superintendent then makes the decision, considering the recommendation of an interagency panel, and render administrative and financial assistance. Such "state-assisted" placements are referred to as "395 placements" because they are provided for under Chapter 395 of the Nevada Revised Statutes (NRS 395.010, 020, 030).

10.5 "Inclusion" and the *Holland* Standard

Is there a standard for determining the appropriate level of mainstreaming or "inclusion"?

Two recent cases decided by the Ninth Circuit Court of Appeals (and having jurisdiction in Nevada), ruled on the issue of determining the level of mainstreaming appropriate for individual students. The court applied the three standards used in *Oberti* and added a fourth standard (cost), yielding the new four-part "*Holland* Test" which examined:

- The educational benefits available to the child in a regular classroom, supplemented with appropriate aides and services, compared with the educational benefits of a special education classroom;
- The non-academic [social] benefits to the child with disabilities (including interaction with nondisabled children);
- The negative effect, if any, of the presence of the child with disabilities on the teacher and other children in the regular classroom; and
- The costs of supplementary aides and services necessary to mainstream the child with disabilities into a regular classroom setting.

Plaintiff Rachel Holland was found to benefit both academically and socially in a mainstreamed (or included) setting. The placement was found to have generated no adverse effects on other students and did not require unreasonable costs to achieve.

In a slightly more recent case dealing with a student of high school age, *Clyde K. and Sheila K. v. Puyallup Sch. Dist.*, the same court demonstrated limitations in the mainstreaming (or inclusion) of disruptive students in regular classrooms, ruling that the student (Ryan K.) failed all elements of the *Holland* test that applied to him:

> Ryan was no longer receiving any academic benefits from his former "mainstreamed" placement, and that it was unlikely that the provision of a personal aide (requested by the parents) would have made a meaningful difference.
>
> Ryan was receiving little or no social benefits as he had become socially isolated and, according to his doctors, suffered stress from being teased by other students.

> Ryan's effect on the teacher and the other students was "overwhelmingly negative." His behavior was dangerous and the court cautioned that Ryan's sexually explicit remarks to female students could be a liability to school officials for "failing to remedy peer sexual harassment that exposes female students to a hostile educational environment."
>
> The cost factor was deemed immaterial in this case as the court noted that the addition of a personal aide would probably not have improved his behavior.

Clyde K. and Sheila K. v. Puyallup Sch. Dist.,
35 F.3d 1396 (9th Cir. 1994)

Prior to the *Clyde K.* case, most major mainstreaming cases dealt exclusively with very young children. Two additional Ninth Circuit Court of Appeals decisions have highlighted the importance of determining the appropriateness and/or level of inclusion on a case-by-case basis. In *Poolaw v. Bishop*, 67 F.3d 830, 1995, the court upheld as appropriate a segregated placement for a student with deafness. The court, noting the conflict between IDEA's preference for placement in the regular classroom and the mandate to meet the unique needs of children with disabilities, made it clear that school officials "retain maximum flexibility to tailor education programs as closely as possible to the needs of each handicapped student." The court in applying the "*Holland* Test" stated that "the IDEA's preference for mainstreaming is not an absolute commandment."

> The question whether to educate a handicapped child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry. In each case, the apparent tension between the IDEA's clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child must be balanced.

20 USC §§ 1401, 1414(a)(5)

The *Poolaw* decision further noted that IDEA is primarily concerned with the long-term educational welfare of students when compared with social benefits of mainstreaming:

> The record reflects that Lionel could receive some nonacademic benefits from continued mainstreaming. He apparently has a number of friends at his school and enjoys some social interac-

> tion with them . . . Although these considerations are very important, the IDEA is primarily concerned with the long term educational welfare of disabled students.

In *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1996, the Ninth Circuit Court of Appeals ruled that the school district erred in not placing a student with a severe behavioral disorder in a residential school setting. The court adopted the following definition of "educational benefit:"

> The term "unique educational needs" [shall] be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical, and vocational needs.
> H.R.Rep. No. 410, 1983 USCCAN 2088, 2106

It is apparent that merely housing a child with disabilities in a regular classroom with chronologically-aged peers with whom the student has little or no meaningful interaction does not meet the child's need for specific instruction from teachers with the expertise to affect educational benefit.

Educators must also be aware that they are accountable for the planning and reporting of the progress of mainstreamed students in the school's general curriculum (IDEA Reauthorization Amendments, § 614(d), 1997).

10.6 Management and Discipline of Special Education Students

What level of disruption to a regular class is considered excessive?

Recent court decisions have placed an emphasis on educators' ability to deal with classroom distractions by mainstreamed students, and the benefits to other students when disruptive students with disabilities are included in the regular classroom. The following federal regulation and case citations were referenced in *Oberti v. Board of Educ.*, 995 F.2d 1204 (3rd Cir. 1993).

> [T]he court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom. While inclusion of children with disabilities in regular classrooms may

> benefit the class as a whole, a child with disabilities may be "so disruptive in a regular classroom that the education of other students is significantly impaired."
>
> 34 CFR Section 300.552

> [I]f a child is causing excessive disruption of the class, the child may not be benefiting educationally in that environment. Accordingly, if the child has behavioral problems, the court should consider the degree to which these problems may disrupt the class. In addition, the court should consider whether the child's disabilities will demand so much of the teacher's attention that the teacher will be required to ignore the other students.
>
> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)

> [A] handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children.
>
> *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991)

While a special education placement is being challenged, where does the student receive educational services?

IDEA states that a child with a disability "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree (20 USC § 1415 (e)(3)). This "stay-put" provision prohibits school authorities from excluding students from classrooms for misconduct that is due to their disability. The *Honig v. Doe* case, decided by the United States Supreme Court in 1988, involved two students with emotional disturbances in the San Francisco Unified School District who were indefinitely suspended without any consideration of their IEPs. This case clearly pointed out that such a change of placement violated the rule that students were to "stay put" in their IEP-mandated placement until a new IEP meeting was held.

The customary 10-day suspension time frame was reinforced as an adequate "cooling down" period while the IEP team could meet and consider alternatives. The 10-day rule (from *Goss v. Lopez* in regular education, and *Honig v. Doe* in special education) represents the outside limit of time a student may be suspended without triggering a formal "court-like" hearing process. *Honig v. Doe*, 484 U.S. 305 (1988), *Goss v. Lopez*, 419 U.S. 565 (1975)

Under Nevada law what is the maximum length of suspension for a special education student?

Nevada statute (NRS 392.467) states that special education students may not be suspended from school for more than 10 days "in accordance with the procedural policy adopted by the board of trustees of the school district." The statute is silent regarding what is meant specifically by "10 days," whether it means a 10-day total for the school year or a 10-day maximum per incident. However, following the *Honig* decision in 1988, the state board of education made Nevada's intentions clear with the following addition to the Nevada Administrative Code:

> 388.265 Suspension, expulsion or exclusion of pupil with disability.
>
> 1. No pupil with a disability, other than a pupil who is gifted and talented, may suspended, expelled or excluded from attendance by a public agency for more than 10 days during any school year except upon compliance with the provisions of this section.
> 2. Before initiating any such suspension, expulsion or exclusion, the public agency shall convene a meeting of the multidisciplinary team appropriate to the disability of the pupil who is the subject of the proposed action. The multidisciplinary team shall determine whether the disciplinary problems of the pupil are associated with his disability and prepare a report containing its findings and conclusions.
> 3. After the meeting of the multidisciplinary team, the public agency shall convene a meeting of the committee responsible for developing the pupil's individualized educational program. That committee, having regard for the findings of the multidisciplinary team and in accordance with the provisions of NAC 388.281, shall revise the individualized educational program of the pupil as it deems appropriate under the circumstances.
>
> (Added to NAC by Board of Education,
> eff. 7-14-88; A 9-13-91; 11-23-93)

Authors' Note: The Nevada Administrative Code will be updated to reflect recent changes to IDEA discussed below.

How has the 10-day suspension limit been extended by the 1997 IDEA Reauthorization Amendments?

45 Day Alternative Placement

Amendments to IDEA allow school authorities to place students with disabilities in alternative placements ("interim alternative educational settings") for up to 45 days for possession of weapons or drugs at school or school functions. Students with disabilities who knowingly possess, use, or sell illegal drugs were included in the new law (IDEA Reauthorization Amendments, 1997).

The new law recommended that within 10 days of placing a student in an alternative placement, the IEP team be convened to either develop a functional behavioral assessment plan or review and modify an existing behavioral intervention plan. IDEA does not specifically require this step before suspensions of more than 10 days begin.

Manifestation Determination

If it is determined that a child's behavior was not a manifestation of the child's disability, the child may be disciplined in the same manner as a child without a disability. However, educational services may not be terminated during the pendency of the alternative disciplinary placement (IDEA Reauthorization Amendments, § 615(e), 1997). See *Riley* decision below.

Emergency Change of Placement

If a school district has demonstrated by substantial evidence ("beyond a preponderance of evidence") that maintaining the current placement of a child with a disability is substantially likely to result in injury to the child or others, a hearing officer may order a change in placement to an alternative educational setting for not more than 45 days (IDEA Amendments, § 615(c), 1997). School districts also have the option of requesting a court order to suspend or otherwise change the placement of a student with a disability. Total cessation of services is not permitted during the pendency of the above actions.

Must students with disabilities who are expelled or suspended for criminal or other serious misconduct be served?

In the 1997 *Virginia Dept. of Educ. v. Riley* decision, the Fourth Circuit Court of Appeals upheld a state statute allowing the discontinuance of free, appropriate public education services to students with disabilities who were expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. The U.S. Department of Education had ordered the withholding of Virginia's IDEA funds until the state changed its statute and resumed providing services to such students. In finding for the state of Virginia, the Fourth Circuit noted that:

> Title 20, USC § 1412(1) guarantees that all children with disabilities be provided "the right" to a free public education; this section does not purport to require that every disabled child be provided a free public education regardless of state disciplinary policies governing the provision of educational opportunities to disabled students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. Since the plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities, the United States Department of Education was without authority to condition the Commonwealth of Virginia's receipt of IDEA funding on the continued provision of free education to such students.
>
> *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997)

It should be noted the above decision does not have jurisdiction over Nevada, and states may go beyond the minimum requirements of IDEA.

How does the federal "Gun-Free Schools Act" affect special education students?

The Gun-Free Schools Act states that each state receiving federal funds shall have in effect a state law requiring local educational agencies to expel from school for not less than one year a student who brings a firearm to school under the jurisdiction of local educational agencies in that state, except that the state law must allow the local educational agency's chief administering officer to modify the expulsion requirement for a student on a case-by-case basis. The Gun-Free Schools Act explicitly states that the Act must be construed in a manner consistent with IDEA.

In response to the above federal law, the 1995 Nevada legislature added language that covers the possession of firearms, other dangerous weapons, and controlled substances while on public school premises. The revised statute (NRS 392.466) follows. Please note that Section 5 of the revised statute pertains specifically to special education students and Section 6 defines "firearms" and "dangerous weapons."

1. Except as otherwise provided in this section, any pupil who commits a battery which results in the bodily injury of an employee of the school, sells or distributes any controlled substance or is found in possession of a dangerous weapon, while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be suspended or expelled from that school, although he may be placed in another kind of school, for at least a period equal to one semester for that school. For a second occurrence, he must be permanently expelled from that school, but he may be required to attend another kind of school.

2. Except as otherwise provided in this section, any pupil who is found in possession of a firearm while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be expelled from the school for a period of not less than 1 year, although he may be placed in another kind of school for a period not to exceed the period of the expulsion. For a second occurrence, he must be permanently expelled from the school, but he may be required to attend another kind of school. The superintendent of schools of a school district may, in a particular case in that school district, allow an exception to the expulsion requirement of this subsection.

3. This section does not prohibit a pupil from having in his possession a knife or firearm with the approval of the principal of the school. A principal may grant such approval only in accordance with the policies or regulations adopted by the board of trustees of the school district.

4. Any pupil in grades 1 to 6, inclusive, except a pupil who has been found to have possessed a firearm in violation of subsec-

tion 2, may be suspended from school or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and approved this action in accordance with the procedural policy adopted by the board for such issues.

5. A pupil who is participating in a program of special education pursuant to NRS 388.520, other than a pupil who is gifted and talented, may, in accordance with the procedural policy adopted by the board of trustees of the school district for such matters, be:
   (a) Suspended from school pursuant to this section for not more than 10 days. Such a suspension may be imposed pursuant to this paragraph for each occurrence of conduct proscribed by subsection 1.
   (b) Suspended from school for more than 10 days or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and determined that the action is in compliance with the Individuals with Disabilities Education Act (20 USC §§ 1400 et seq.).

Author's Note: IDEA and Section 504 require a determination by a group of persons whether the bringing of the firearm to school was a manifestation of the student's disability. If the group determines that bringing a firearm to school was not a manifestation of the student's disability, the student may be expelled.

6. As used in this section:
   (a) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of NRS 200.481.
   (b) "Dangerous weapon" includes, without limitation, a blackjack, sling shot, billy, sand-club, sandbag, metal knuckles, dirk or dagger, a nunchaku, switchblade knife or trefoil, as defined in NRS 202.350, a butterfly knife or any other knife described in NRS 202.350, or any other object which is used, or threatened to be used, in such a manner and under such circumstances as to pose a threat of, or cause, bodily injury to a person.
   (c) "Firearm" includes, without limitation, any pistol, revolver, shotgun, explosive substance or device, and other item included within the definition of a "firearm" in 18 USC § 921, as that section existed on July 1, 1995.

10.7 Due Process Hearings Under IDEA

How are due process hearings conducted in Nevada?

Nevada's compliance with the requirements of IDEA is reflected in two state documents, Nevada Administrative Code (NAC), Chapter 388, and Nevada's State Plan for Part B of the Individuals with Disabilities Education Act, which include state procedures for impartial due process hearings and specify the educational rights of children/youth with disabilities and their parents.

The laws and rules point out several specific circumstances where either a parent or public educational agency may initiate a hearing. Within forty-five (45) days of the receipt by the school district of request for a hearing, an impartial hearing officer must be appointed, the hearing held, and a decision reached and written by the hearing officer and sent to the parties. If either party disputes the findings of the hearing officer, they may appeal the decision to the state superintendent of public instruction who will appoint an independent review officer. The decision reached by the independent review officer may be appealed to a court if either party disputes the decision.

How are prehearing conferences conducted and what are they intended to accomplish?

The hearing officer must arrange for a telephone conference call with the parent and the school district to accomplish the following:

1. To establish dates for the hearing;
2. To discuss whether any extensions are anticipated, the procedures for requesting extensions, and under what circumstances extensions will be granted. Normally, extensions should only be granted for good cause, which include the unavailability of a party's representative or important witness, sickness, injury, a strong possibility of settling through continued mediation or other negotiations, etc;
3. To ascertain whether either party has an objection to the hearing officer serving;
4. To determine the location of the hearing and ensure that the district makes the necessary arrangements for a hearing location, including informing the district of desirable characteristics of a hearing site (e.g., parking facilities, telephone availability, copying services, convenient lunch options, waiting rooms for

witnesses, recording equipment, number and arrangement of tables and chairs, etc.);

5. To inform the parties of the evidence disclosure requirements, and to request that the parties also submit a copy of the written (documentary) evidence and a list of witnesses and the general nature of their testimony to the hearing officer at the same time such information is disclosed to the other party. If the hearing officer has a preference for organization of the evidence (e.g., numbering the exhibits, binding the exhibits, etc.) this should be discussed at this time. The parties should also be encouraged to work together to prepare a list of facts upon which they can agree ("stipulated facts"), and they should be encouraged to submit joint evidence packets where possible, to save time at the hearing;
6. To inform the parties of the procedures available to compel the attendance of witnesses and to advise them of the timeline required to issue and serve subpoenas;
7. To ascertain whether the parent will open the hearing to the public, and to ensure that the parent understands the confidentiality ramifications of such a decision;
8. To ascertain whether the parties desire to have witnesses sequestered during the testimony of other witnesses;
9. To resolve any witness-scheduling problems;
10. To inform the district of its responsibilities, which include: notifying the parent, in writing of the time, date, and location of the hearing; free/inexpensive legal and other relevant services available; and additional parental rights;
11. To determine whether the pupil will be present during the hearing;
12. To determine whether interpreter services or other accommodations will be necessary;
13. To determine, if possible, the precise issues that will be heard;
14. To ascertain if there are any prehearing disputes that might require prehearing briefing or evidence;
15. To inform the parties of who will be expected to initially proceed with presenting their case; and
16. To ascertain whether either party will be represented by counsel and, if known, the names,addresses, and phone numbers of counsel.

Who may ask for a hearing?

The parents (including guardians) of a child with a disability or child suspected of having a disability or the local educational agency (school) may ask for a hearing.

When may a hearing be requested?

A hearing may be requested when there is a proposal or refusal by either the parent or the school to initiate or change the identification, assessment, or educational placement of a child with a disability. A hearing may also be requested when there is a proposal or refusal to initiate or to change the provision of a free appropriate public education to the child.

How does one request a hearing?

Both parents and schools may request a hearing by writing to their local superintendent of schools. The request should provide as complete information as possible. Included should be:

1. The name and age of the child
2. The child's grade level
3. The school where the child attends
4. The name and address of the child's parents
5. A brief explanation of why the hearing is being requested.

What assistance is available to parents?

The school is required to advise the parent of the availability of any free/inexpensive legal or other services to the parents.

What is mediation and when does it occur?

Following a request for a hearing, but usually prior to a hearing officer being named, an effort to mediate or settle the dispute with the assistance of an intermediary may occur. Mediation is an informal meeting by which the parents, the school, and an experienced mediator attempt to resolve the dispute in a nonadversarial atmosphere. The mediator will be impartial and will try to assist the parties in reaching a resolution of the dispute. Participation in the mediation process is voluntary.

What if one of the parties does not want to participate in mediation?

Mediation is based upon the commitment of both parties to try to reach a mutually-satisfactory settlement. Mediation is encouraged because it is informal and nonadversarial and is more likely to lead to a lasting settlement of the dispute. However, either party has the right to waive mediation; and, if mediation is waived by either party, the case will go directly to hearing.

What considerations are necessary in scheduling mediation?

The mediation conference is scheduled at a time and place reasonably convenient to the parent and the pupil. The location for mediation conferences is typically local school facilities.

What happens if the parties reach an agreement during mediation?

Any agreement reached during mediation must be to the satisfaction of both parties and must be consistent with the requirements of federal and state law. The agreement will be prepared in writing by the mediator and signed by the parties. A copy will be sent to the state department of education along with a due process withdrawal request. The hearing request will be dismissed.

What happens if an agreement is not reached during mediation?

If the issues are not resolved during mediation, the dispute will continue to hearing. The mediator can be helpful by preparing a list of unresolved issues to be presented at the hearing.

When will the hearing be scheduled?

Typically, the hearing occurs as soon as possible (considering disclosure and other timeline requirements), with date(s), time, and place mutually agreed upon. However, if consensus is impossible, the hearing officer may make such determinations.

How long will the hearing process take?

The law requires that the hearing be held and a written decision mailed within forty-five (45) days of receipt of the request for hearing. However, the forty-five (45) days can be extended by a continuance of the hearing, granted for good cause.

When is it permissible to extend the 45-day time limit?

Either party may request a continuance of the hearing. The hearing officer will consider the merits of the request and the impact on the other party. If he/she determines there is good cause, the hearing will be continued to date certain (specific date) and the forty-five (45) day time limit will be extended by the number of days of the continuance.

What is "good cause" for a continuance?

The law does not specify what circumstances constitute good cause. Certainly, good cause would generally exist if the parties believe mediation might lead to a settlement of the dispute and the party who asked for the hearing agrees to extend the forty-five (45) day time limit. Other examples of good cause might include sickness or injury that prevents a party, representative, or important witness from attending the hearing at the time scheduled. It is ultimately up to the hearing officer to determine whether there is good cause for an extension of the forty-five (45) day time limit.

Who will conduct the hearing?

The hearing will be conducted by an impartial hearing officer appointed by the state department of education. The hearing officer cannot have any personal or professional interest that might conflict with his/her objectivity or be an employee of a public agency that is involved in the education or care of the child. The hearing officer is knowledgeable in the laws governing special education and administrative hearings.

What will happen to the child's education during the hearing process?

The law requires that the pupil remain in his or her present educational placement during the hearing process and pending the written decision, unless the school and the parents agree otherwise. This requirement is often referred to as the "stay put" provision of the law. The "stay put" requirement also applies to the time during which a hearing officer's decision is being appealed.

What are the parties' rights during the hearing?

Both the school and the parent have the following rights during the hearing:

Right to representation. Both parties have the right to be accompanied, advised, and assisted by counsel and individuals with special knowledge or training related to the problems of children with disabilities.

Right to present evidence and argument. Both parties have the right to call witnesses and present written and other evidence that will help them prove their case. They will also be given the opportunity to argue the merits of their case orally or in writing.

Right to confront and cross-examine adverse witnesses. Both parties have the right to be present when witnesses testify against their position and to ask them questions concerning their views.

Right to compel the presence of witnesses. If a witness refuses to appear at the hearing voluntarily, the party requesting that witness has the right to force him or her to come to the hearing. This is accomplished by notifying the state department of education of the need to compel the witness's attendance. Before requesting assistance, the party should first determine whether the witness will be at the hearing voluntarily.

Right to obtain a record of the hearing. The law requires that either a written or recorded verbatim record be made of the hearing by the public agency.

Right to written findings of fact and decision. The hearing officer must prepare a written decision setting forth his or her findings of fact, analysis of the law, and final decision.

Right to prohibit the introduction of surprise evidence. Both parties have the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to them at least five days before the hearing. The hearing officer instructs each party to give the other party—at least five (5) days before the hearing—a copy of all evidence the party plans to present in the hearing, including a list of witnesses expected to be called and the general nature of their testimony.

Right to exclude witnesses. A party may ask that the hearing officer order prospective witnesses to remain outside the hearing room while other witnesses are testifying. This practice allows the hearing officer to compare the testimonies of witnesses who have not heard one another testify.

Right to an interpreter. If the primary language of a party is other than English, or if the party is hard of hearing or deaf, an interpreter will be provided. It is important that the parties notify the hearing officer well before the hearing when an interpreter is needed.

In addition to the rights listed above, the parents have the following additional rights:

Right to examine pupil records. Parents have the right to examine all records maintained by the school that are related to their child before the hearing. Parents should contact their local school district for procedures for accessing pupil records.

Right to public hearing. Parents have the right to allow members of the public to attend the hearing.

Right to have the pupil present at the hearing. Parents have the right to have the pupil with disabilities present during the hearing.

Are parents entitled to a free attorney?

Both parties have the right to be represented at all stages of the dispute (including the IEP meeting, the mediation conference, and the hearing) by an attorney or other representative of their choosing. That does not mean that the school must pay for the parent's attorney. If the parents prevail at the hearing, the parents have the right to seek attorney's fees through an appeal to a court, if the district will not voluntarily pay.

What is the format of a hearing?

The purpose of the hearing is to allow both parties to present evidence supporting their positions and to explain to the hearing officer why they believe they should prevail in the hearing. The hearing is not governed by formal rules of procedures or evidence, and the hearing officer will attempt to ensure that both sides have an adequate opportunity to present their cases. Although less formal than a court trial, the hearing is expected to proceed in an orderly fashion.

At the beginning of the hearing, the hearing officer will identify the case for the record and briefly explain how the hearing will proceed. The hearing officer then usually clarifies the issues to be decided by discussing the case with the parties.

Once these preliminary matters are completed, the parties are given a chance to make opening statements. After the opening statements, the side presenting first will call its witnesses, with each witness being sworn to tell the truth. After one side has presented its witnesses and other evidence, the other side will call its witnesses. Each side will be given an opportunity to ask questions of the other side's witnesses, and the hearing officer may also ask questions of the witnesses. At the end of the hearing, each side is allowed to make a closing statement. After closing statements, the hearing record is closed, unless the hearing officer indicates otherwise. The hearing officer then prepares a written decision.

Which party is required to present its case first in a hearing?

The party who has requested the hearing is usually expected to present its case first. If the party requesting the hearing believes that the other party should be required to present first, the requesting party should raise the issue at the prehearing conference. A hearing officer will discuss this issue with both parties prior to ruling on this issue.

What is "evidence" and how is it presented?

Evidence is anything that furnishes proof. Some common forms of evidence are testimony of witnesses, including the parents' own testimony, and documents. Typically, documents in the pupil's file are put into evidence.

How are documents put into evidence?

To put documents into evidence, the party presents documents to the hearing officer and asks that they be put into evidence. Sometimes this is done at the beginning of the hearing and sometimes it is done as the hearing proceeds. Each document presented into evidence is assigned a letter or number to identify it and that number or letter is used to refer to the document during the rest of the hearing. (Remember that both parties must provide copies of the documents they wish to offer as evidence to the other party and to the hearing officer five (5) days prior to the hearing.)

Documentary evidence is often cumbersome, and dealing with it in the hearing can be confusing and time-consuming. One way the parties can help avoid this problem is to agree beforehand what documents will be placed into evidence and then have one binder prepared with all documents in a logical order. Each document in the binder can be assigned a letter. Tabs or dividers can be used to make it easier to locate each document and pages in the binder can also be numbered consecutively to permit easy reference during the hearing.

If the parties are unable to agree on which documents will be presented in the hearing, each party should logically organize its documents in a separate binder. Parents should assign a letter to each of their documents in alphabetical order and the school should assign a number to each of its documents. Tabs or other dividers can be used for easy access to each document. Both parties should be sure to provide a copy (three hole punched, if possible, to be ready to place in a binder) to the other party (at least five days prior to the hearing). Both parties should also bring an extra copy of their evidence in a binder for use by witnesses. This approach will greatly simplify the use of documentary evidence during the hearing.

How does one get a witness to attend the hearing?

The party requesting the presence of the witness should first contact the witness and ask him or her to attend the hearing voluntarily. (Parents wishing to call a witness who is an employee of the school should contact the school representative and ask for assistance in making the witness available.) If a witness refuses to attend the hearing and a party believes that the witness is important to its case, that party may request that the state department of education compel the attendance of the witness.

What law should one read and where can one locate it?

There are four primary sources of law relating to special education and to hearings and mediations: Nevada state statutes and regulations and federal statutes and regulations.

The federal statute, Individuals with Disabilities Education Act (IDEA), is contained in the United States Code, Volume 20, Sections 1400-1420. The federal regulations for this special education law are contained in the Code of Federal Regulations (CFR), Volume 34, Sections 300.1-300.754. Copies of the United States Code and the Code of Federal Regulations are available at the county law library or local libraries that are government repositories. The Nevada Administrative Code (NAC), Chapter 388, contains the state regulations on special instructional services and programs.

There are a number of court decisions that interpret the statutes and regulations. These court decisions can also be found at a county law library.

What if a party disagrees with the decision of the hearing officer?

Both parties have the right to appeal any hearing decision to a state review officer. If either party disagrees with the review officer's decision, appeals can be made to either state or federal court. The review officer's decision is the final administrative determination and is binding on all parties unless a party successfully appeals to a court.

If the parent prevails as a result of the hearing or on appeal to the court, must the school pay for parent's attorney?

Parents may be entitled to have costs of attorneys' fees reimbursed if they prevail as a consequence of initiating a due process hearing. The court, in its discretion, may award reasonable attorneys' fees to the parents or guardian of a child or youth with disabilities who is the prevailing party. However, hearing officers cannot award attorneys' fees under federal law and in order to collect them, parents must petition the court.

Are there any other parental rights that parents should be aware of?

Yes, there are a number of important rights that parents have in relation to special education. Below are listed some of the most important ones:

> The right to initiate a referral to special education. A parent has the right to request that a child be assessed and considered for special education services.
>
> Right to an independent assessment. If a parent disagrees with an assessment that has been provided by the school, the parent has the right to obtain an independent educational assessment of the pupil from a qualified specialist. However, the school may

initiate a hearing to show that its evaluation is appropriate. If, at such a hearing, the hearing officer decides that the school assessment is inappropriate, the school district shall pay for the independent assessment. If the hearing officer decides that the school assessment is appropriate, the parent may obtain additional assessment at his/her own expense.

Right to information about and participation in the development of the pupil's individualized educational program. The law provides that parents have the right to participate in the development of a child's individualized educational program. The law further requires the school to inform parents of their child's right to a free appropriate education and to provide information concerning all available alternative programs, both public and nonpublic.

Consent of parents to perform assessment. The law provides that written parental consent must be obtained before a preplacement evaluation of a pupil is conducted unless the school prevails in a due process hearing relating to such assessment.

Consent of parents before placement in special education. The law provides that written parental consent must be obtained before a pupil is initially placed in a special education program.

What qualifications are required of hearing officers?

Essential Qualifications

1. **Judicial Temperament:** Ability to treat all parties fairly, to take charge, to ensure the issues of controversy and scope of the hearing are clearly defined, to disregard all prejudicial influence, to discern the truth and apply the law, to maintain confidentiality and impartiality, and to protect the parties' rights of due process.

2. **Absence of a Conflict of Interest:** In addition to the case-by-case determination of impartiality, there must be an overall absence of a real or perceived conflict of interest. Therefore, the candidate
    a. May not be an employee of the State Education Agency (SEA), including a state board member. (An independent consultant who contracts with the SEA, retains his/her independence from the SEA, and is not under its influence or control, is not considered an employee.)

   b. May not have a personal or professional interest that would conflict with his or her objectivity in a hearing. (This would include a personal or professional investment in a policy. For example: a professed philosophical/professional commitment to the appropriateness of a particular educational technique for students with a specific disability, regardless of the facts of a particular case, or to a single placement option for all children with disabilities.)
   c. May not be in the private business of providing or supervising special education and/or related services or residential placement of students with disabilities.
   d. May not act as a representative of either districts or parents in special education hearings, or has not acted in that capacity in the one year preceding the training. (This exclusion does not apply to an employee of a district or a parent who has appeared solely as a party to a hearing. The one-year requirement may be waived if the candidate demonstrates a balanced representation of both districts and parents.)
   e. May not have a spouse who is a current employee of the SEA, including a board member. If a member of the hearing officer's immediate family is a current employee of the SEA, including a board member, the candidate must demonstrate the ability to maintain confidentiality and impartiality and this familial relationship must be disclosed in each hearing.

3. **Commitment to Accept Appointment as a Hearing Officer:** Commit to accept the appointment as a hearing officer to two hearings in the applicable calendar year.

Knowledge and Experience in the Following Area

Priority will be given to candidates who demonstrate expertise in each of the following areas.

1. Knowledge of and demonstrated experience in the state and federal laws and regulations governing special education.

2. Knowledge of and demonstrated experience in administrative hearings.

3. Knowledge of and demonstrated understanding of at least the following concepts: the comprehensive evaluation of students

with suspected disabilities, the determination of eligibility of a student with disabilities, the development and implementation of Individualized Educational Programs, the provision of a free appropriate public education, the continuum of placement options, and the requirements of least restrictive environment.

Authors' Note: Information for section 7 was excerpted and adapted from the *Procedures Manual for: Impartial Due Process Hearing, Administrative Appeal/Review, and Complaint Resolution* and the *Training Manual for: The Impartial Due Process Hearing Officer*, both published by the Nevada Department of Education, Educational Equity Team, revised January 1997.

10.8 Title I of the Elementary and Secondary Education Act of 1965

Who is eligible and what services are provided under "Title I"?

Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to provide full educational opportunity to every child regardless of economic background. Toward that end, Title I channels federal funds through the states to local educational agencies (LEA's). The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. LEA's must use funds to help participating children meet state student performance standards. LEA's may use funds to provide counseling, mentoring, and other pupil services. An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area, and (ii) who is failing, or is at risk of failing, the state's student performance standards. Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools, and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children."

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. The Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school.

20 USC § 6301 et seq.
Reenacted, Improving America's Schools Act of 1994, 108 Stat. 3518

May publicly-funded Title I teachers provide services in parochial schools?

Yes. Twelve years after the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402, held that the Establishment Clause barred the New York City Board of Education from sending public school teachers into parochial to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the Elementary and Secondary Education Act, parents filed a motion seeking review (technically, they sought to overturn a permanent injunction resulting from the *Aguilar* decision).

The Supreme Court in overruling *Aguilar v. Felton* ruled that providing Title I services at parochial school sites does not violate the Establishment Clause and that the parents were entitled to relief from the permanent injunction because of significant changes in Establishment Clause law. Citing *Zobrest* and other recent decisions, the majority in *Agostini* concluded that, "Later Establishment Clause cases have so undermined *Aguilar*, that it is no longer good law."

The Court in their 5-4 decision noted that complying with *Aguilar* had resulted in additional costs to New York City of over $100 million dollars in the past decade, coupled with a decline of approximately 35 percent of private school children served. The Court, however, sidestepped the opportunity to re-evaluate and possibly reconsider the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) three-part test, leaving the language, if not the spirit, of the *Lemon* Test intact.

Agostini v. Felton, 117 S.Ct. 1997 (1997)

According to *Education Week*, the U.S. Department of Education suggested the following guidelines for Title I personnel at parochial school sites:

- Only public employees could serve as Title I instructors and counselors;

- Assignment of public school personnel to private schools was made without regard to the religious affiliation of the employee;
- All religious symbols were removed from classrooms for Title I services;
- Personnel were instructed to limit their consultations with the regular classroom teacher to discussions concerning mutual concerns about the students' education; and
- A publicly-employed field supervisor made one unannounced visit to each teacher's classroom each month.

Education Week, August 6, 1997, pp. 26, 33

10.9 Communicable Diseases

What laws and guidelines are being used regarding students with AIDS and other communicable diseases?

Most courts have ruled that seropositive ("healthy carriers") as well as those with active AIDS are covered under Section 504. The courts have used four factors in determining whether a student is "otherwise qualified" (or qualified in spite of the condition) to attend regular classes:

(a) The nature of the risk (how the disease is transmitted),
(b) The duration of the risk (how long is the carrier infectious),
(c) The severity of the risk (what is the potential harm to third parties), and
(d) The probabilities the disease will be transmitted and will cause varying degrees of harm.

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)

Several courts have cited the 1986 Surgeon General's report which was issued prior to the three recent AIDS cases involving dentists:

> There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of the AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other.

> None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other body fluids . . . would be effective in preventing transmission from children with AIDS to other children in school. . . .
>
> Casual social contact between children and persons infected with AIDS virus is not dangerous.
>
> *U.S. Public Health Service, Surgeon General's Report on Acquired Immune Deficiency*, at 13 (1986)

It is the consensus of medical experts that children with AIDS do not constitute a serious risk to other students with whom they are in casual social contact; therefore, a child with AIDS is a person with a disability under 504 and is otherwise qualified to attend a public school classroom. The exception to this general rule would be if factors were present that would increase the risk of transmission such as in the *Martinez v. School Bd. of Hillsborough County* case, where the child frequently had saliva on her fingers and suffered from skin lesions. (In this instance, the child was placed in the regular classroom, but with regular checks by the school nurse regarding advisability of attendance on certain "higher danger" days.)

Do persons with communicable diseases have employment protections under Section 504?

As with other 504 claims, those disabled by AIDS must show that they are "otherwise qualified" to meet occupational requirements. "Otherwise qualified" individuals are those that can perform "essential functions" of a job or educational program (in the case of a college student) despite their disability. "Reasonable accommodations" must be made to facilitate their performance of essential functions, however, a reasonable accommodation is only reasonable as long as it does not impose undue financial hardship or burden on the employer or institution. The following landmark case illustrates this legal premise.

> This seminal U.S. Supreme Court decision held that a college did not discriminate against a student with a serious hearing impairment when it denied her admission to its nursing program. The Court concluded that the student was not "otherwise quali-

> fied" because she could not effectively participate in clinical courses without individualized supervision by an instructor. Such supervision and/or lowering of program requirements to allow access go beyond the "reasonable accommodation" requirements of Section 504.
>
> *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)

See Chapter 8, Section 1 for more detail regarding employment protections and requirements under Section 504. See Appendix D for selected case law interpreting Section 504 and employment.

In Nevada, which agency is responsible for directing actions regarding AIDS?

Section 441A.190 of the Nevada Revised Statutes requires health authorities to direct actions regarding AIDS within schools. It also requires health authorities to notify school district superintendents of the presence of AIDS, superintendents to notify health authorities, and principals to notify superintendents.

What AIDS education is required by Nevada law?

Section 389.065 of the Nevada Revised Statutes addresses AIDS education within the state and cites the following mandates for each district:

1. The board of trustees of a school district shall establish a course or unit of a course of
   (a) Factual instruction concerning acquired immune deficiency syndrome; and
   (b) Instruction on the human reproductive system, related communicable diseases and sexual responsibility.

2. Each board of trustees shall appoint an advisory committee consisting of
   (a) Five parents of children who attend schools in the district; and
   (b) Four representatives, one from each of four of the following professions or occupations:
      (1) Medicine or nursing;
      (2) Counseling;
      (3) Religion;

(4) Pupils who attend schools in the district; or
(5) Teaching.

This committee shall advise the district concerning the content of and materials to be used in a course of instruction established pursuant to this section, and the recommended ages of the pupils to whom the course is offered. The final decision on these matters must be that of the board of trustees.

3. The subjects of the courses may be taught only by a teacher or school nurse whose qualifications have been previously approved by the board of trustees.

4. The parent or guardian of each pupil to whom a course is offered must first be furnished written notice that the course will be offered. The notice must be given in the usual manner used by the local district to transmit written material to parents, and must contain a form for the signature of the parent or guardian of the pupil consenting to his attendance. Upon receipt of the written consent of the parent or guardian, the pupil may attend the course. If the written consent of the parent or guardian is not received, he must be excused from such attendance without any penalty as to credits or academic standing. Any course offered pursuant to this section is not a requirement for graduation.

5. All instructional materials to be used in a course must be available for inspection by parents or guardians of pupils at reasonable times and locations before the course is taught, and appropriate written notice of the availability of the material must be furnished to all parents and guardians.

Note the requirement in section 4 that parents on behalf of their children must "opt into" the district's AIDS curriculum.

Chapter 11

School District Liability

11.1 Adequate Supervision

What are tort actions?

School-related tort actions are frequently lawsuits brought by parents on behalf of students claiming that a personal injury was the result of a school employee's negligent action rather than an unavoidable accident. Such litigation has been popular in the past two decades because of the potential for large monetary damage awards.

By definition, a tort is a wrongful act (intentional or unintentional)—not including breach of contract—which results in injury to another's person, property, or reputation for which the injured party is entitled to compensation. The most common tort action is a group of unintentional acts defined as negligence.

How is negligence defined?

Negligence is defined[1] as a failure to exercise that degree of care that an ordinarily careful and prudent person would exercise under the same or similar circumstances. Professional persons, such as teachers or administrators, will be held to a standard based on the skills and training they should have acquired in their professional training and experience. A court or jury considering a charge of negligence may well ask if the teacher involved acted or behaved as a reasonably prudent teacher should have behaved under similar circumstances. Even if the act is totally unintentional, the teacher may be found negligent if the judge or jury believes they did not act as one might expect a reasonable teacher to act.

How is negligence proven?

For a plaintiff to prove a claim of negligence, he or she must present evidence of four separate elements:

1. A duty of care must have existed between the plaintiff and the defendant.
2. The defendant must have breached that duty.
3. The plaintiff must have been injured (physically or emotionally).
4. The defendant's breach of duty must have been the proximate cause of plaintiff's injury.

Courts have agreed that teachers have a duty of care while they are "on duty." For example, during class time, it is a reasonable expectation to assume that teachers will exercise adequate supervision of students. Some important tort cases have gone against teachers who were absent from their classrooms or duty stations when a serious injury took place. While it is clear that teachers should be in their classrooms during class time, it is not so clear whether or not a duty exists on school grounds before or after the school day. Courts must determine if preschool supervision is within the teacher's "scope of duty." Such cases are decided considering state law, school policy, contractual agreements past practices, and a host of other variables.

Continuing with the classroom supervision example, and assuming that a duty exists, breach of the duty might be found where the teacher responsible is gone from the classroom for an extended period of time. Failure to take appropriate action (omission) that may have prevented an injury from occurring is also actionable. Most school districts have policies designed to avoid such practices and omissions.

The third element requires the party bringing suit to have actually sustained an injury. This issue is not as simple as it may appear, especially when emotional injury is claimed. Emotional injury, though more difficult to prove, is also allowed as a compensable form of injury. Originally, emotional harm had to be accompanied by physical injury in order to be compensable. In more recent years, however, such harm can form the basis of a tort action by itself and can, in some cases, prove as costly as many kinds of physical injury.

Proximate cause means the injury was either the direct result or a reasonably probable consequence of the act or omission. In other words, without the act or omission, the injury probably would not have occurred. Using the classroom example, a teacher leaving a room full of unsupervised students could lead to students throwing objects. In at least two major tort cases, a student sustained permanent eye damage while the supervisor was absent. In such a scenario, the teacher's absence was not the immediate or direct cause of the injury (another student throwing the object was), but the absence was still considered the proximate cause because the court reasoned that if the teacher had been in the classroom, the injury would not have resulted.

It should be noted that multiple causation is also possible when other individuals are found to be "substantial factors" in producing an injury.

What factors are considered in determining the level of duty required?

Duty of care is weighed against:

1. Age and maturity of plaintiff.
2. Nature of the risk to which student was exposed.
3. Evidence of precautions taken to lessen risk or avoid injury.

11.2 Liability Defenses

Are students responsible for their own conduct?

Defendant (school district) may argue that the plaintiff contributed to his or her own injury. In the past, no damages were awarded to the plaintiff when this defense was successfully argued. However, this was a difficult argument to prove because students have a diminished standard of care to themselves (regarding their own behavior). For example, a student after being told not to operate a power saw while the teacher was in an adjoining wood storage room, disobeyed the instructor, causing permanent injury to his hand. The student sued, claiming improper supervision. The teacher's attorney claimed that the student had contributed to his own injury and thus was not entitled to an award of damages. In this case the student won because of the lessened duty of care to himself. The court ruled that such behavior from adolescents was "somewhat expected." Cases such as this are won and lost depending upon the unique circumstances involved.

What is meant by "assumption of risk"?

School districts, in attempting to defend themselves and their employees, can argue that the plaintiff (usually a student) knowingly and voluntarily placed himself or herself in a position yielding exposure to risk of injury. The burden of proving such a defense is on the defendant (school district). The district must show:

1. Plaintiff knew or should have known the level of risk.
2. Plaintiff had sufficient time, knowledge, and experience to choose to avoid risk.

What is the status of sovereign or governmental immunity?

In the past, schools and other public entities relied on a protection from lawsuits inherited from England called "sovereign immunity" and more recently "governmental immunity." Originally, the king (sovereign) was exempt from liability because the "king could do no wrong" and could be sued only with his permission. This convenient and effective defense gradually became modified as it transitioned into democratic America. However, courts remained protective of blunders by public employees, because when reaping a damage award against a negligent public worker, the amount of the award (especially prior to the era of massive insurance coverages) came from public tax monies, which many judges and juries considered better spent on public projects or salaries.

The eroding of the governmental immunity doctrine was hastened by the now-famous *Molitor v. Kaneland* decision in 1959 which concluded in part:

> It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrong-doing without any responsibility to its victims. . . .
>
> . . .We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society.

See *Molitor v. Kaneland Community Unit Dist. No. 302*, Supreme Court of Illinois, 1959, 18 Ill.2d 11, 163 N.E.2d 89.

Since the *Molitor* and subsequent rulings, many state legislatures, including Nevada, have enacted limited waivers of their governmental immunity protections.

How are school employees protected by the Nevada Immunity Waiver?

In enacting the limited waiver of governmental immunity protection, the Nevada legislature requires public employers to provide such protection. For this protection to be invoked, the employee must act in good faith, promptly notify the school attorney and request legal defense, and cooperate in their defense. If the court determines that the employee acted in good faith, damages are limited to a set maximum, and paid for by the employing district, along with reasonable attorney fees.

The 1997 Nevada legislature passed the following amendment to Chapter 41 of NRS:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
   (a) Was a truly independent venture of the employee;
   (b) Was not committed in the course of the very task assigned to the employee; and
   (c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment. ...Conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury. ...

May teachers and administrators be sued for malpractice?

Yes, but several suits such as the one below were decided in favor of school districts in the 1970s, citing the difficulty in assigning culpability or blame for educational deficiencies. Since then, many states including Nevada have passed legislation allowing public entities, including schools, to be sued for limited amounts under partial immunity waivers.

In this famous educational malpractice case, *Peter W.* or *Peter Doe*, as he was also known, brought suit against the San Francisco public school system. Peter graduated from Galileo High School, considered to be an average high school in a middle-class or upper middle-class neighborhood, with a C average. Following graduation he was employed in a shoe store but was fired because he could not perform the simple arithmetic tasks of adding tax to the price of the shoes. Peter maintained that educators failed to act reasonably in administering to his educational needs.

The court, however, denied Peter's claim for three reasons:

1. The absence of a workable rule of care against which defendant's conduct may be measured.
2. The inherent uncertainty in determining the cause and nature of any damages.
3. The extreme burden which would be imposed on the already strained resources of the public school system.

Peter W. v. San Francisco Unified Sch. Dist.,
131 Cal. Rptr. 854 (1976)

When must protective eyewear be worn in classrooms?

NRS 392.455 states if a school district has established classes in occupational education, the teachers and pupils in those classes must wear devices provided by the school district which are designed to protect their eyes while they are using power tools, torches or other dangerous equipment or machinery. The teachers and pupils in classes in science must wear devices provided by the school district which are designed to protect their eyes when chemicals or toxic substances are used in those classes.

Are school liability release forms valid?

Releases required to be signed by students or parents as a condition of engaging in school activities, which hold school districts blameless from liability for negligence, have, in other jurisdictions, been ruled invalid. For example, in the *Wagenblast* decision, the court determined:

1. Parents can't waive the rights of students to reasonable care.
2. School districts enjoy an unfair bargaining position.
3. As a contractual instrument such waivers are null and void.
4. Waivers are not viable as a proof of assumption of risk unless all conceivable potential injuries are listed.

The court suggested that school districts may require parental or guardian consent, but should use straightforward school forms for such use. See *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968 (1988).

11.3 Supervision Guidelines

What are the most common reasons coaches are sued?

Coaches are frequently sued for alleged failure to:

- Warn players about the possibility of being injured
- Properly supervise players at all times
- Offer proper instruction
- Properly condition a player for the specific activity
- Offer proper equipment and facilities
- Give proper first aid and/or emergency care.

What guidelines are suggested to avoid or lessen liability in athletics?

1. Maintain records of everything. Such documentation should demonstrate progressive, sequential and well-planned practice procedures. Written records demonstrate professionalism.
2. Establish training rules that not only include the standard items such as the avoidance of alcohol, drugs, smoking, etc., but also include policies about transportation, equipment care, the reporting of injuries to the athletic trainer and horseplay in the locker room. Include such items as proper rest and nutritional needs.
3. Follow state rules to the letter, especially as they apply to safety considerations.
4. Establish an emergency procedure. Suggestions include using wallet-sized cards listing procedures and important phone numbers.
5. Follow the advice of physicians. For example, if the doctor advises against participation by a player (including a key starter), don't play him or her.
6. Don't allow an injured player to return to participation without the approval of the athletic trainer and/or doctor.
7. Know the basics of equal competition, especially in the early stages of the season. The "green" 185-pound wrestler should not be scrimmaging against the 185-pound returning state champion.

8. Learn to say no. This is the hardest word in the coach's vocabulary. Say no to the athlete who wants to stay after practice for extra work if no supervision is available. Today's litigious climate no longer permits such practices as unsupervised workouts.
9. If a potential legal situation does arise, avoid unnecessary communication. Take care of the injured player, and be considerate and professional. Do not, however, offer your opinion, accept blame or give unnecessary information to the media or public at large.

11.4 Sexual Harassment

How is sexual harassment defined and regulated by Civil Rights Statutes and recent case law?

Title VII of the Civil Rights Act of 1964 protects employees against sexual harassment in the workplace. Title IX of the Education Amendments of 1972 also prohibits sex discrimination in educational institutions. The language of the Titles is as follows.

Title VII, Civil Rights Act of 1964, Section 703(a) states in part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title IX, Education Amendments of 1972, Section 901 provides in part:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC) while Title IX is enforced by the United States Department of Education's Office for Civil Rights (OCR).

In 1980 the Equal Employment Opportunity Commission (EEOC), prodded by court cases in the 1970s which began to view sexual harassment as a form of sex discrimination, published definitions regarding sexual harassment.

The Equal Employment Opportunity Commission guidelines imply two types of sexual harassment, *quid pro quo* (something for something) and *non quid pro quo* (actions or verbal messages creating an offensive, hostile, or intimidating work environment). The second type of harassment is now frequently referred to as "hostile work environment" harassment. Regulations promoted by the EEOC state:

> Harassment on the basis of sex is a violation of § 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> 1. Submission to the verbal or physical harassment is made either explicitly or implicitly a term or condition of an individual's employment.
> 2. Submission to or rejection of the verbal or physical harassment is used as a basis for employment decision affecting such an individual.
> 3. The verbal or physical harassment has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
>
> [An employer is responsible] for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

In *Meritor Savings Bank, FSB v. Vinson* (1986), the precedent-setting case on sexual harassment, the U.S. Supreme Court rendered this definition:

> Guidelines provide that sexual conduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The "*Meritor* standard" defines an "abusive work environment" as one that a reasonable person would find hostile or abusive and one in which the victim's subjective perception is that the environment is abusive.

The *Henson v. Dundee* (1982) case made a connection between racial and gender barriers to equality:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.

Strength was added to the enforcement of Title IX by the United States Supreme Court's decision, *Franklin v. Gwinett County Pub. Sch.* (1992). The Court held that the recovery of monetary damages was available under Title IX for the sexual harassment of a student by a school teacher when school officials intentionally took no action to halt it. Additional definition of the term "sexual harassment" will be required in determining the scope and limitations of this case's application in the school setting. Prior to this case, the only enforcement remedy under Title IX was the withholding of federal funds, which the Office for Civil Rights (OCR) had never exercised.

In a recent Title VII action, *Harris v. Forklift Systems* (1993), the United States Supreme Court ruled that proving "abusive work environment" harassment has taken place no longer requires evidence of serious psychological damage, but may be ascertained by considering all of the circumstances involved in the situation. In attempting to define what constitutes harassment, the Court concluded:

> This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the EEOC's new regulations on this subject, . . . But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological wellbeing is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychologi-

cal harm, like any other relevant factor, may be taken into account, no single factor is required.

Are students protected against student-to-student sexual harassment?

Peer sexual harassment is a developing area of school law. However, the Ninth Circuit Court of Appeals (with jurisdiction over Nevada) in the *Doe v. Petaluma* decision, ruled that Title IX does not provide a damage remedy for peer sexual harassment among students (*Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir 1995).

11.5 Protection from Violent Students

What notice must be given to employees when working with dangerous students?

According to a 1993 National School Boards Association report, about 5,200 of the nation's 2.5 million teachers are attacked monthly—1,000 of them seriously enough to require medical care. Some teachers have resorted to obtaining restraining orders from local courts to remove dangerous students or suing their parents for damages.

To protect teachers and other employees who come into regular contact with dangerous students, the Nevada legislature has enacted the following statute (NRS 392.468).

Section 1. NRS 392.468 is hereby amended to read as follows:

392.468

1. The board of trustees of a county school district, or its designee, shall inform each employee of the district, including teachers, other licensed employees, drivers of school buses, instructional aides and office managers, who may have consistent contact with a pupil if that pupil has, within the preceding 3 years, unlawfully caused or attempted to cause serious bodily injury to any person. The district shall provide this information based upon any written records that the district maintains or which it receives from a law enforcement agency or a court. The district need not initiate a request for such information from any source.

2. A school district and the members of its board of trustees are not liable for failure strictly to comply with this section if a good faith effort to comply is made.
3. Any information received by an employee pursuant to this section is confidential and must not be further disseminated by the employee.

Sec. 2. Chapter 62 of NRS is hereby amended by adding thereto a new section to read as follows:

1. If a court determines that a child who is currently enrolled in school unlawfully caused or attempted to cause serious bodily injury to another person, the court shall provide the information specified in subsection 2 to the school district in which the child is currently enrolled.
2. The information required to be provided pursuant to subsection 1 must include:
   - (a) The name of the child;
   - (b) A description of any injury sustained by the other person;
   - (c) A description of any weapon used by the child; and
   - (d) A description of any threats made by the child against the other person before, during or after the incident in which the child injured or attempted to injure the person.

Sec. 3. Chapter 200 of NRS is hereby amended by adding thereto a new section to read as follows:

1. If a court determines that a person who is currently enrolled in a secondary school unlawfully caused or attempted to cause serious bodily injury to another person, the court shall provide the information specified in subsection 2 to the school district in which the offender is currently enrolled.
2. The information required to be provided pursuant to subsection 1 must include
   - (a) The name of the offender:
   - (b) A description of any injury sustained by the other person;
   - (c) A description of any weapon used by the offender: and
   - (d) A description of any threats made by the offender against the other person before, during or after the incident in which the offender injured or attempted to injure the person.

Nevada law regarding the suspension and expulsion of pupils who cause bodily injury or possess dangerous weapons or firearms is addressed in Chapter 9 of this text.

Chapter 12

Religion and the Public Schools

12.1 Church and State Separation

How have legal decisions modified religious influence in the public schools?

Most religious expression and curriculum issues involving the U.S. Constitution (usually the First Amendment) have been resolved by the federal court system. Many of the legal decisions found in this chapter have been decided by the U.S. Supreme Court which has jurisdiction and authority in all states. Although Nevada is rarely mentioned specifically in this chapter, decisions referenced have been used in shaping school district policies and procedures throughout the United States.

Our nation was founded at least in part on Judeo-Christian principles, some carried over from British common law. Early public school curriculum included instruction in the tenants of Christianity, but by the 1940s reinterpretation of the First Amendment's "establishment clause" yielded several U.S. Supreme Court decisions advocating separation of religious influence from the public sector, including public schools. By the 1980s this interpretation had been modified, but the concept of treating all religions in a neutral manner has prevailed. Accompanying legal decisions have determined that such practices as teacher-led or school-sponsored prayer are an unconstitutional advancement of religion.

The First Amendment's "free speech" clause has received attention and renewed support in a series of recent legal decisions. These decisions reinforce student rights to religious expression in the public school and protect student clubs (and community religious groups) from discrimination based on the religious nature of their activities.

Was the original intention of the First Amendment to limit religious influence?

The issue of "original intent" of the constitutional framers remains controversial, but many authorities believe that a primary intention was the limitation of denominational influence on government. The framers were concerned with governmental interference with the free exercise of religion as demonstrated by the colonies' insistence on written assurance guaranteeing such rights as a requirement for constitutional ratification.

The First Amendment to the Constitution states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The meaning of "establishment" is clear from early drafts of what became the First Amendment:

> That religion, or duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*
>
> Adopted by The Virginia Ratifying Convention, June 1788

Another early draft of what was to become our First Amendment from The Journal of the Senate, circa 1789:

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

It should be noted that some of the framers clearly favored governmental neutrality toward all religions, especially in the context of public taxation for church/clergy support:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclu-

> sion of all other Sects? That same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?
>
> *Memorial and Remonstrance against Religious Assessments,*
> James Madison, 1785

Did the American government during the constitutional period demonstrate a preference for a particular faith?

Governmental preference for generic Christianity was frequently cited, most notably in the Supreme Court case of *The Church of the Holy Trinity v. The United States* (1891), which included numerous Christian-oriented quotations from state constitutions and ordinances. Included in this decision was the oft-quoted passage from the Northwest Ordinance which assumed a commingling of religion and education:

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

The passage was also quoted in the famous case, *Meyer v. Nebraska*, 262 U.S. 390 at 400 (1923).

Christian preference was also cited in many state cases. In *People v. Stanley* (1927), a typical case of the era, the court enthusiastically reaffirmed that Bible reading was permissible as a school-sponsored secular activity, while allowing a challenge by Catholic parents regarding the exclusive use of the King James version (the preferred translation of Protestants). The following statements from *Stanley* were commonplace in legal decisions during the late 19th and early 20th centuries:

> It is not the Bible itself that is sectarian . . . It therefore cannot be said that Bible reading in the public schools causes the taxpayers to pay for aid to a sectarian purpose.
>
> Id. at 616, quoting *Donahoe v. Richards*, 38 Me. 379 (1854)

> One cannot teach morality without teaching something out of that book.
>
> Id. at 616, fn. 3

> The Bible is not sectarian, and is not inimical to the welfare of the child, but on the contrary contains lessons in good citizenship.
>
> Id. at 622

Supreme Court Justice Joseph Story who served on the High Court for 34 years candidly summed up era thinking on the subject of separation of church and state as follows:

> [A]t the time of the adoption of the Constitution . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
>
> The real object of the amendment was to . . . exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.
>
> *Commentaries on the Constitution of the United States*, Vol. 2, 593-5

Were American private, religious schools in danger of being banned?

Yes, at least in Oregon. In the early 1920s following World War I, a national movement began, aimed at controlling foreign influence in the United States. For example, the teaching of foreign languages was forbidden in the high schools of at least two states during this period. Some of Oregon's leaders decided that the surest way to control how children developed socially and politically was to control their early value acquisition. And how better to accomplish such a goal than to mandate uniform public schooling for all children. A referendum was drafted and an official statement was published by its sponsors. It stated in part:

> What is the purpose of our public schools, and why should we tax ourselves for their support? Because they are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests.
>
> Our children must not under any pretext, be it based on money, creed, or social status, be divided into antagonistic groups, there

> to absorb the narrow views of life, as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions, each striving, not for the good of the whole, but for the supremacy of themselves. A divided school can no more succeed than a divided nation.
>
> We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

The referendum was successful and was to take effect in 1926. The law was to require all children between the ages of eight and sixteen to attend public schools until the completion of the eighth grade. Private school corporations, including the Society of Sisters of the Holy Names of Jesus and Mary (who operated a parochial school for girls) and Hill Military Academy (operating an elementary, college preparatory, and military training school for boys), sought a restraining order to halt enforcement of this law pending the outcome of the judicial process.

In a 9-0 decision the U.S. Supreme Court ruled that the state may reasonably regulate schools and has a compelling interest in requiring school attendance, but the state may not deny children the right to attend adequate private schools, and force them to attend only public schools. The decision also stated that the Oregon Act interfered with the liberty of parents to direct the education of their children and hindered the property interests of private school corporations. This case is the source of the following oft-used "parental rights" quotes:

1. Our constitutional government excludes any power of the state to standardize children;
2. Children are not mere creatures of the state; and
3. Parents have the higher right to control the lives and values to be adopted by their children.

Pierce v. Society of Sisters, *268 U.S. 510 (1925)*

Must schools be neutral regarding religion?

Yes. The landmark *Everson v. Board of Educ.* case (1947) was, on its surface, a case about spending public monies to pay bus fares for parochial school students, which the U.S. Supreme Court ruled did not violate the Establishment Clause of the First Amendment. However, far more important, this case represented a strong reassertion of the doctrine of separation of church and state. Citing *Reynolds v. United States* (1879), the Court quoted Thomas Jefferson's reference to a desired "wall of separation" and, in the words of the writer of the majority opinion, Justice Hugo Black, emphatically stated that the First Amendment:

> [R]equires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Are schools allowed to sponsor prayer or religious readings?

The landmark *Abington Township v. Schempp* case (1963) and its companion case, *Murray v. Curlett*, challenged state-sponsored Bible reading. The U.S. Supreme Court ruled that the Establishment Clause of the First Amendment (made applicable to the states by the Fourteenth Amendment) requires states to be neutral toward religion and forbids state establishment of religion.

Despite High Court encouragement for educators to continue using the Bible in a secular manner, such as in history or literature courses, teachers generally avoided Bible use or teaching about religion for fear of violating the First Amendment. The Supreme Court had ruled school-sponsored prayer unconstitutional a year earlier in the *Engel v. Vitale* decision.

In summary, the *Abington* and *Engel* decisions determined that the Bible:

- May not be taught devotionally
- May be used in a historical context
- May be used as literature

What standard was developed by the Supreme Court to protect against state-sponsored involvement in religion?

The *Lemon v. Kurtzman* case (1971) and its companion case, *Earley v. Dicenso*, related to state aid to parochial schools. The states of Pennsylvania and Rhode Island had enacted statutes to enhance secular education in private schools. Both states channeled public monies to supplement nonpublic school teacher salaries, the overall goal being the improvement of their secular curriculum. The Supreme Court ruled that a law providing state subsidy for nonpublic school teacher salaries was unconstitutional.

The larger and lasting legacy of these cases, however, was the use of a tripartite or three-pronged test which, in effect, outlawed governmental involvement in activities which (a) did not have a secular purpose, (b) advanced or inhibited religion, and (c) fostered an excessive government entanglement with religion. The Court ruled that the arrangements made with the nonpublic schools failed the "*Lemon* test." An example of entanglement was the bookkeeping problems involved in tracking public monies through private school accounts. The majority opinion stated:

> The Constitution decrees that religion must be a private matter for the individual,the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Is separation of church and state absolute?

No, courts have allowed some degree of flexibility. For example, in the *Bowen v. Kendrick* decision, the U.S. Supreme Court allowed public grant monies to be distributed to a religiously-oriented teen sexuality program.

In 1981 Congress passed the Adolescent Family Life Act (AFLA), which provided grants to public or nonprofit private organizations and agencies for "services and research in the area of premarital adolescent sexual relations and pregnancy."

An organization with, at the least, tangential connections to a religious denomination applied for and was awarded a grant under the above Act. This organization counseled teenagers against having sexual relations (abstinence) and abortions (advocating an "adoption option"). An action was brought questioning whether or not the Act as written was constitutional when sufficiently scrutinized using the "*Lemon* test."

The U.S. Supreme Court in a 5-4 decision ruled that the AFLA did not violate the First Amendment for the following reasons:

1. The Act has a valid secular purpose which is the "elimination or reduction of social and economic problems caused by teenage sexuality."
2. The Act does not have the primary purpose of advancing religion—even if some of the approaches used by grantees coincide with the practices or beliefs of various religious organizations.

3. The Act does not create excessive entanglement of church and state.

A quotation from the majority opinion follows:

> Nothing in our previous cases prevents Congress . . . from recognizing the importance that religion or religious organizations may play in resolving certain secular problems.
>
> *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988)

May school officials include invocations or benedictions at graduation exercises?

No. In the *Lee v. Weisman* case (1992) the parents of a middle school child complained that the school's role in choosing a member of the clergy for invocations and benedictions at middle school graduation ceremonies constituted a violation of the Establishment Clause of the First Amendment.

The U.S. Supreme Court agreed, ruling that school-sponsored benedictions or invocations at public school graduation ceremonies violate the First Amendment because:

> [R]eligious beliefs and religious expression are too precious to either be proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . .

12.2 Equal Access and Benefit Availability

Must schools allow religious organizations to use their facilities when school is not in session?

No. School districts, like owners of private property, may legally preserve the property under its control for the use to which it is dedicated. However, when districts "open" the property for public use, they may not practice viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.* (1993), the Lamb's Chapel, a local evangelical church, planned to present a video series on family values and child development and requested the use of the local school district facilities. The Center Moriches School District had adopted policy based on a New York state education law that permitted school boards to allow facility use for ten specific purposes including social, civic, recreational, and entertainment uses, but prohibited use by any group for religious purposes.

The district refused the church's request, stating that "[t]his film does appear to be church related and therefore your request must be refused." The school district had, on several occasions, allowed other organizations (including a New Age religious group) to use their facilities for discussions of somewhat similar topics. The Lamb's Chapel church sued and eventually prevailed before the U.S. Supreme Court which ruled that refusing to allow a church access to school property to show a film with a religious viewpoint, when the district allowed other organizations access for similar purposes, violated the Free Speech Clause of the First Amendment. The Court further noted that allowing the exhibition of such a film on public school premises did not run afoul of the *Lemon* test, since the screening would not occur during school hours, was not sponsored by the district (and would not be perceived by the public as an endorsement of religion), and was open to the public (not just the particular church congregation).

Following the landmark *Lamb's Chapel* case, the Nevada Attorney General issued an opinion which reiterated the Supreme Court edict:

> Nevada constitution (see Nev. Art. 11, §§ 2, 9 and 10) does not prohibit use of school facilities by sectarian groups for occasional worship services outside of normal school hours if board of trustees of school district has created limited public forum and cost associated with use is reimbursed to school district. However, board of trustees is not required to create limited public forum or permit sectarian activity.
>
> (See also NRS 393.071.), AGO 93-2 (3-16-1993)

May government-supported services be provided in nonpublic schools?

In *Zobrest v. Catalina Foothills Sch. Dist.* (1993), the parents of a student with deafness placed their son in a private, religious school and requested that the local public school district continue providing a sign language interpreter free of charge. The district, acting on advice from the Arizona Attorney General's Office, refused, stating that such an arrangement would violate the Establishment Clause of the First Amendment. The parents then hired an interpreter and brought suit to recover their expenses.

The Supreme Court ruled in favor of the parents, reasoning that:

> Government programs [such as IDEA] that neutrally provide benefits to a broad class of citizens are not prohibited from doing so just because some religious institutions may—in the process—receive an incidental financial benefit. The child is the primary beneficiary.
>
> The government-paid interpreter is on the religious school grounds only as the result of a parent's private decision [rather than the result of government-sponsored decision making].
>
> An interpreter, unlike a teacher or guidance counselor, neither adds to nor subtracts from the religious school's environment.

Because of the last rationale listed, many legal scholars believed this case would have very narrow applicability since teachers and counselors were evidently excluded. However, the 1997 Supreme Court decision in *Agostini v. Felton* proved otherwise (see below).

May publicly-funded Title I teachers provide services in parochial schools?

Yes. Twelve years after the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402, held that the Establishment Clause barred the New York City Board of Education from sending public school teachers into parochial to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the Elementary and Secondary Education Act, parents filed a motion seeking review (technically, they sought to overturn a permanent injunction resulting from the *Aguilar* decision).

The Supreme Court in overruling *Aguilar v. Felton* ruled that providing Title I services at parochial school sites does not violate the Establishment Clause and that the parents were entitled to relief from the permanent injunction because of significant changes in Establishment Clause law. Citing *Zobrest* and other recent decisions, the majority in *Agostini* concluded that, "Later Establishment Clause cases have so undermined *Aguilar*, that it is no longer good law."

The Court in their 5-4 decision noted that complying with *Aguilar* had resulted in additional costs to New York City of over $100 million dollars in the past decade, coupled with a decline of approximately 35 percent of private school children served. The Court, however, sidestepped the opportunity to reevaluate and possibly reconsider the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) three-part test, leaving the language, if not the spirit, of the *Lemon* Test intact. *Agostini v. Felton*, 117 S.Ct. 1997 (1997)

According to *Education Week*, the U.S. Department of Education suggested the following guidelines when Title I personnel serve at parochial school sites.

- Only public employees could serve as Title I instructors and counselors;
- Assignment of public school personnel to private schools was made without regard to the eligious affiliation of the employee;
- All religious symbols were removed from classrooms for Title I services;
- Personnel were instructed to limit their consultations with the regular classroom teacher to discussions concerning mutual concerns about the students' education; and
- A publicly employed field supervisor made one unannounced visit to each teacher's classroom each month.

Education Week, August 6, 1997, pp. 26, 33

For further information on Title I eligibility and services, please see Chapter 10, Section 8 of this text.

12.3 Student Rights to Free Exercise of Religion

May schools officially recognize student religious organizations?

Federal legislation known at the "Equal Access Act" was upheld by the U.S. Supreme Court in Board of Education of the *Westside Community Sch. v. Mergens* (1990) and created a right of student-initiated religious or political groups to meet on high school premises during noninstructional time. This right exists only where school policy allows other noncurriculum-related student groups to meet. All such noncurricular activities remain under school board rules, but religious and political groups must be both student initiated and student led.

The case originated at Westside High School in Omaha, Nebraska, where Bridget Mergens and other students sought permission and official recognition for Bible club activities. The school district denied the request contending that such activities would violate the Establishment Clause of the First Amendment. The school district prevailed at the district court level, lost at the appeals level, and again lost at the Supreme Court level. The Supreme Court ruled that the school's refusal to permit the club to meet violated the Equal Access Act (EAA) because other clubs, not directly related to school curriculum (such as chess and scuba clubs), were allowed to meet and enjoyed official recognition. The Court interpreted "noncurriculum-related student group" broadly to mean any student group that does not directly relate to the body of courses offered by the school. The Court, considering the *Lemon* standard, stated:

- The Act's purpose to prevent discrimination against religious and other types of speech was considered undeniably secular.
- The Act was seen to avoid endorsing religion because the school would not be perceived by students as endorsing religious speech.
- Meetings were to be held during "noninstructional" time.
- No excessive entanglement between government and religion existed because faculty monitors could not participate in any of the meetings; and nonschool persons could not directly control, or regularly attend, activities of the student group.

In summary, students have a right to organize their own groups in public schools, whether they are religious, political, or philosophical, when the school district has created an "open forum" by allowing other noncurriculum-related student groups to meet on school premises.

12.4 Curriculum and Instructional Issues

How is the term "secular humanism" defined?

Definitions change as evidenced by comparing dictionary citations 27 years apart:

> Secular: From seculum - an age or generation (L); temporal, worldly . . . pertaining to this present world or to things not spiri-

tual or sacred; relating to or connected with the objects of this life solely; disassociated from religion teachings or principles . . . (1)

Temporal: From tempus - time (F/L); pertaining to this life, or this world, or the body only, opposed to spiritual. Measured or limited by time, or this state of things; having limited existence; opposed to eternal. (1)

Secularism: Supreme or exclusive attention to the affairs of this life . . . choosing as its method of procedure the promotion of human improvement by natural means. (1)

Secularize: To deprive of religious character, influence, or significance. (2)

Humanism: A modern, nontheistic movement that holds that man is capable of self-fulfillment,ethical conduct, etc., without recourse to supernaturalism. (2) A religious cult based on faith in man. (1) Secular movement from the Renaissance. (2)

1.*Webster's Universal Unabridged Dictionary* (1945)
2.*Webster's New World Dictionary* (1972)

Humanism is often divided into at least the following five categories:

1. **Classic and Renaissance humanism** - The classic culture of Greece and Rome had centered upon things worldly. Its directions were governed by rational thinking and learned study. When Renaissance men rediscovered that ancient culture, they applied it to the traditions of the Middle Ages. You might say that they added classic logic and worldliness to the spiritualism of the Middle Ages. What they ended up with was Renaissance humanism. Humanism is the philosophy that man stands at the center of things. The activities and products of man are more important than the activities of nature and of the spirit. Man therefore was the central theme of Renaissance humanism" (J. Weston Walch, 1972). Classical humanism was central to the development of the college liberal arts curriculum, and cultural transmission approaches such as Paideia.

2. **Political humanism** - Examples include Marxist humanism which sought an end to class struggles and exploitation through

heavy-handed political and material manipulation, allegedly for the ultimate good of all. Marx, in *Das Kapital*, said, "Mind is the product of matter, that is, mind has evolved from material stuff. The non-living matter has always been; it has produced the living, and finally, the non-intelligent has produced the intelligent (man)." An example from Mao Tse-Tung's *The Foolish Old Man Who Removed Mountains*, stated that "Our God is none other than the masses of the Chinese people."

3. **Religious humanism** - stresses the dignity of man in relation to God. This sounds positive, but it is difficult to differentiate between the influences of God and man. For example the motto of a well-known, church-related university is "The Glory of God is Intelligence."

4. **Secular humanism** - Harvey Cox, of the Harvard Divinity School, in his 1969 best-seller, *The Secular City*, well defined secular humanism as "a liberation of man from religious and metaphysical tutelage." It represents the philosophy that mankind, when free from allegedly out-moded religious myth, can reach a kind of "secular utopia."

5. **Educational humanism** - usually refers to the child-centered but stridently secular philosophy of education popularized by John Dewey and others. This exclusively secular worldview occasionally clashes with parents and others who champion traditional or religious values.

What First Amendment arguments were used in the famous "secular humanism" cases?

The *Mozert v. Hawkins* case from Tennessee and the *Smith v. Board* case from Alabama were argued and decided in different circuits but presented very similar arguments. The *Mozert* case involved parents wishing to have their children opt out of reading classes which included objectionable passages from the Holt series. The *Smith* case brought over six hundred parents and teachers together as plaintiffs who objected to a reading series and more than forty text and library books.

In both cases plaintiffs' arguments were similar, as each claimed that objectionable books or passages:

1. Advanced a religion of secular humanism.

> Plaintiffs argued that curriculum materials inculcated exclusively secular values. If secular and humanistic curricula could be shown to be "religious" in the sense of replacing absolute traditional values with materials that addressed some of the same matters of ultimate concern, then such a curriculum would be functioning as a religion, and therefore, contrary to the current interpretation of the establishment clause.

2. Inhibited theistic religion.

> Plaintiffs argued that the exclusive use of materials advocating a secular and humanistic value system undermined the teachings and values that they embraced, inhibiting the free exercise of their religion, and thus violative of the free exercise clause of the First Amendment.

The courts determined that to violate one's free exercise rights, government must coerce belief or coerce action that prevents exercise of that belief. In both cases, plaintiffs' objections to school curricula was ruled not to have met the court's criteria of coercion. Since the coercion standard is still being relied upon, plaintiffs are seeking relief from viewpoint discrimination under the First Amendment's Free Speech Clause.

The leading "Free Exercise Clause" decisions from the United States Supreme Court continue to be *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Wisconsin v. Yoder*, the Court ruled that the religious beliefs and practices of the Amish were inseparable from their daily way of life and that Wisconsin law requiring formal education beyond the eighth grade infringed on the free exercise of their religion (which may be infringed upon only for compelling reasons). In *West Virginia State Bd. of Educ. v. Barnette*, the Court ruled that passive refusal to salute the American flag did not pose such a substantial danger to the interests of the state that a person's First Amendment rights to free expression required suppression.

See *Mozert v. Hawkins County Bd. of Educ.* (6th Cir. 1987) *cert. denied*, 56 U.S.L.W. 3569 (U.S. Feb. 22, 1988) and *Smith v. Board of Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987).

May schools use a controversial curricula such as the "Impressions" series?

In *Brown v. Woodland Joint USD* (1994) parents brought suit claiming that the selections in the *Impressions* series impermissibly advanced the religion of Wicca (witchcraft). They argued that such a curriculum promoted a specific religion or a specific pattern of beliefs which breached constitutional neutrality on the subject of religion and nonreligion, thus violating the Establishment Clause of the First Amendment.

Most of the challenged selections ask children to discuss witches or to create chants. Some selections also asked students to pretend they were witches or sorcerers and then invited them to role-play those characters in various situations.

Using the reasoning from *Lee v. Weisman*, the court required that the case be analyzed from the viewpoint of an "objective observer in the position of an elementary school student," and if such an observer "would perceive a message of endorsement of witchcraft, or of disapproval of Christianity." The court found that no such message of endorsement existed and that students were not coerced into a disavowal of their parent's religious views.

Because this case was decided by the Ninth Circuit Court of Appeals it has jurisdiction over *Impressions* and similar curriculum challenges in Nevada.

May school teachers teach creationism?

The Louisiana legislature passed a "balanced treatment act" which mandated equal teaching time for creation science and evolution. Before the Act was implemented plaintiffs brought suit, claiming that the Act did not have a secular purpose and would impermissibly advance religion.

In the *Edwards v. Aguillard* (1987) decision the U.S. Supreme Court ruled that the Act failed to have a clearly secular purpose. However, the majority opinion concluded that such an Act was not necessary because "teachers already possess the flexibility to supplant the present science curriculum with the presentation of theories besides evolution about the origin of life." The larger issue of whether or not creation science can be taught in a secular manner is yet to be determined. However, school board decisions to limit science curriculum to evolution only have been upheld.

Is Nevada's "period of silence" constitutionally permissible?

In 1977 the Nevada legislature added the following language to the Nevada Revised Statutes:

> Every school district shall set aside a period at the beginning of each school day, during which all persons must be silent, for voluntary individual meditation, prayer or reflection by pupils.
>
> NRS 388.075

In 1985 an attorney general's opinion stated that the above statute does not violate the Establishment Clause of the First Amendment because the statute was enacted with a secular legislative purpose, does not advance or inhibit religion, and does not foster excessive governmental entanglement with religion (AGO 8515 (10-01-1985)).

Chapter 13

Private Schools and Home Schooling

13.1 Requirements for Private Schools in Nevada

How are private schools licensed?

1. A designated representative of the institution shall appear before the board at the time the application for a license or renewal of a license is considered.
2. After a license is issued, the licensee shall inform the department, in writing, of any proposed change in the staff and in the nature or purpose of the institution.
3. An institution shall secure the approval of the department before initiating any change in its nature or purpose. Failure to notify the department of such a change may result in the revocation of its license.

Nevada Administrative Code (NAC) 394.020

What information regarding organization, instruction, and enrollment is required?

1. The applicant shall submit to the department:
   (a) A list containing the names, descriptions, and levels of proposed courses;
   (b) Proposed schedules of classes;
   (c) A description of measurable objectives for each grade and course and the procedures to be used in evaluating attainment of the objectives;
   (d) An indication of the maximum number of pupils to be enrolled in each grade and course;

   (e) An indication of the number of instructors to be assigned to each grade and course;
   (f) The organizational structure and assignments of certificated and noncertificated staff,including assignments to grades and courses;
   (g) A statement disclosing the cost of courses, including all fees; and
   (h) A copy of each financial agreement between the institution and the parents or guardian of a pupil.

2. All grades offered must be indicated in the application. Except as otherwise provided in this subsection, courses must, at a minimum, be commensurate to and offered at the levels described in the Nevada Elementary Course of Study, the Nevada High School Graduation Requirements, and Chapter 389 of NRS. An institution that offers special education to pupils with disabilities may present an alternative course of study for approval.
3. Schedules of classes must meet the minimum requirements contained in the Nevada Elementary Course of Study, the Nevada High School Graduation Requirements, and Chapter 389 of NRS.
4. Anticipated maximum enrollments are subject to the limitations of the facility and staff. Enrollments indicated must be reconciled with the sections of the applications relating to the facility, staff, and budget.
5. All costs, including instructional costs, costs of transportation and food, fees for activities, and other charges to be paid by the pupil or his parent or guardian must be identified separately. The purpose of the charge must be described.

NAC 394.030

What additional information regarding facilities and pupil-teacher ratios is required?

1. The applicant shall
   (a) Assure that the size of the institution is such that each pupil enrolled in:
      (1) An academic program is provided with not less than 30 square feet of usable instructional space;
      (2) A kindergarten is provided with not less than 35 square feet of usable instructional space; and
      (3) A vocational course or other program which, by its description, concentrates on a nonacademic activity is

provided with not less than 50 square feet of usable instructional space.

(b) Describe the facilities and equipment available for physical education and recreation and how the measurable objectives of a course in physical education will be met.

(c) List the materials in the library and describe the other facilities and services available for instruction, research, and study.

(d) Describe the available audio-visual and instructional equipment, such as . . . charts and maps, blackboards, tagboards, machines, and models. All instructional material provided should be consistent with the measurable objectives for each grade and course.

(e) List textbooks and supplementary materials to be used for each course. Instructional material must be consistent with the measurable objectives for each grade and course and must be made available in sufficient amounts to accommodate the number of students projected for enrollment. Basic textbooks and appropriate supplementary materials must be made available to all pupils.

(f) Indicate the ratio of pupils to instructors. A minimum of one full-time instructor is required for every 35 pupils or fraction thereof, if the institution enrolls more than 35 pupils. If the institution enrolls less than 30 pupils, the ratio of pupils to instructors must be 15 to 1 when more than three grades are offered. In any event, the ratio of pupils to instructors must not exceed 35 to 1 if the institution has a single grade.

2. A full-time administrator must be employed for each institution which enrolls 150 or more pupils or employs six or more full-time instructors.

3. An institution which enrolls less than 150 pupils or employs less than six full-time instructors shall designate a person to serve as a liaison with the department. The liaison must hold a teacher's or administrator's certificate issued by the department and shall
   (a) Ensure that the institution is operated pursuant to all applicable laws and regulations.
   (b) Develop curricular materials.
   (c) Provide training to employees of the institution.
   (d) Supervise and evaluate the staff of the institution.

NAC 394.040

What are the requirements for administrators and faculty?

1. A full-time administrator must hold an administrator's certificate issued by the department.
2. A supervisor must hold a teacher's certificate issued by the department.
3. An instructor must hold a teacher's certificate issued by the department appropriate for his assignment.
4. The licensee shall
   - (a) On October 15 of each year and whenever there is a change in the staff of the institution, submit a report identifying each certificated employee, his assignment and the identifying number on his certificate, and a report identifying each noncertificated employee and his social security number.
   - (b) Submit a resume of the previous applicable experience of the full-time administrator or designated liaison and three references, one of which must be local, attesting to the character, reputation, and competence of the administrator or liaison.
   - (c) Prepare and submit descriptions of the jobs of each class of employee, including both certificated and noncertificated employees. The descriptions must reinforce the philosophy of the institution.
   - (d) Submit a description of the procedures for evaluating administrators, supervisors, instructors, and other educational personnel.

NAC 394.050

What other informational materials are required?

1. The applicant shall provide a sample of the institution's catalog or brochure containing at least the following information:
   - (a) The name and address of the institution;
   - (b) The names of the members of its governing body, its officials, and faculty;
   - (c) The date of publication of the catalog;
   - (d) The philosophy of the institution;
   - (e) A brief description of proposed grades and programs;
   - (f) The institution's daily schedule of classes and, if secondary education is provided, the number of credits which a student must earn;

  - (g) A description of all charges, the purpose for each charge, and the methods and time of payment;
  - (h) A detailed schedule of all fees including tuition, fees for books, supplies, activities for pupils and for the use of laboratories, service charges, rentals, deposits, and charges for room and board; and
  - (i) A clear statement of the institution's policy on cancellations and refunds.
2. The applicant shall indicate the method he will use to distribute the approved catalog or brochure to parents and pupils before enrollment. The contents of the catalog or brochure must be incorporated in all agreements and contracts for enrollment.
3. Calendars showing legal holidays, beginning and ending dates of terms, and other important dates must be provided for each of the two years under the term of the license. The school year must include at least 180 school days.

NAC 394.060

What records must private schools supply?

1. The applicant shall submit to the department
   - (a) The name of the person who is responsible for maintenance of records and provide an example of a proposed folder for the cumulative record of a pupil.
   - (b) The proposed location of all records of the institution.
   - (c) The name of the person who will be responsible for the records in case of the termination of operations by the institution.
   - (d) The institution's policy of retention of records.
2. The institution shall maintain permanent records in a separate file on each pupil. Such records must show the pupil's attendance, grades and other documentation directly related to his progress, and contain his certificate of immunization.
3. Records must be maintained in a safe, secure place reasonably protected from fire and misuse and from access by unauthorized persons.
4. If an institution plans to close or otherwise terminate its operation, its owners or administrators shall notify the department and submit to it all permanent records of pupils as well as all records pertinent to the financial resolution of encumbrances and indebtedness.

NAC 394.070

What other documents and policies must be provided and reported?

Evaluation of pupils and transfer of credits must be provided:.

1. The applicant shall
   (a) Describe or provide a sample of the educational credentials to be used to indicate that the student has satisfactorily completed the course of instruction or study.
   (b) State the institutional policy relative to transfer of credits for previous education and training.
   (c) State how such credentials will be transferred to a comparable school without loss of credit.
   (d) Provide an example of a proposed student transcript of credit.
   (e) Provide a copy of the diploma or certificate of completion which the institution plans to issue to students.
2. Credits earned at the institution shall be such that an enrolled student may transfer to a comparable institution without loss of credit.

NAC 394.080

The applicant shall provide records of attendance, progress, and performance:

1. State institutional policy and regulations relative to absences, tardiness, and unsatisfactory attendance and the procedure used to maintain and report attendance.
2. State institutional policy and regulations relative to standards of progress required of students, including the grading system, conditions for probation, dismissal, and reentrance.
3. State the methods to be used in student evaluation.

NAC 394.090

What information is required concerning existing or proposed buildings?

1. An applicant shall submit plans, blueprints, or line drawings which describe in detail the facilities in which the institution will operate. "As built" drawings shall be submitted for existing facilities.
2. Facilities which are proposed, including extensive remodeling, repairs, or additions to existing buildings, shall be delineated by plans and specifications prepared by architects or engineers li-

censed to practice in this state. The board may require submission of plans for review. Costs of the review shall be paid by the applicant. A license will not be issued unless the plans include a firm schedule for construction of facilities.NAC 394.100

Facilities; compliance with Occupational Safety and Health Act; vehicles.

1. The applicant shall submit documents certifying that the facilities have been inspected and meet the requirements of building codes; codes for the prevention of fire; and codes for safety, health, and sanitation before a license will be issued or renewed.
2. The applicant shall submit evidence that he has communicated with the division of industrial relations of the department of business and industry regarding compliance with the federal Occupational Safety and Health Act of 1970, as amended, before a license will be issued or renewed.
3. The applicant shall submit documents certifying that any vehicle for the transportation of pupils has been inspected by the department of motor vehicles and public safety as to its condition, equipment, and identification.

NAC 394.110

Inspection of facilities and plans. Facilities or plans shall be inspected and approved by the department for conformity with acceptable educational standards and specifications, and for compliance with the provisions of this chapter [394] before a license is issued.

NAC 394.120

Certificate of inspection; fire drills; insurance; applicability of requirements to rented or leased facilities.

1. The applicant shall
   (a) Provide a completed certificate of inspection by the department.
   (b) Describe procedures for fire drills and provide sample information to be posted in rooms.
   (c) Describe the proposed or actual program of insurance for the institution and give the name of the agent.
   (d) Maintain adequate insurance in force at all times covering buildings and equipment of the institution.

  (e) Maintain a contract of insurance against loss arising from death, personal injury, or damage to property in an amount not less than $300,000 for each occurrence.

2. These provisions . . . apply to any facility which will be rented or leased by the applicant. The applicant shall submit to the department a copy of the rental agreement or lease and the name of the owner of the facility. [See NAC 394.100, 110, and 120.]

NAC 394.130

What financial disclosure is required?

1. Applicants for an initial license or for renewal of a license shall submit a proposed budget showing estimated revenues and expenditures for each of the two years of operation authorized by the license, to establish reasonable financial stability.
2. An applicant shall
   (a) Fully disclose to the department all owners, directors, officers, shareholders, trustees, and any other parties maintaining a financial interest in the institution and the basis upon which the organization is legally constituted. An incorporated institution shall submit a certificate of authorization to do business from the secretary of state and a copy of its articles of incorporation and bylaws. Any changes in the articles or bylaws must be reported to the board.
   (b) Submit a financial statement. An institution with an enrollment of at least 30 pupils but not more than 150 pupils shall have a certified public accountant or public accountant compile the statement. An institution with an enrollment of more than 150 pupils shall have a certified public accountant review the statement and sign it.
3. If circumstances reflect adversely on the financial stability of the institution, the board may order that an audit be performed at the expense of the applicant.
4. Evidence of an official declaration of tax-exempt status by the Internal Revenue Service must be submitted with an application from a nonprofit organization.

NAC 394.140

Are there restrictions on advertising the school's licensure?

Yes, the Nevada Administrative Code states that:

1. An applicant shall provide samples of proposed advertising.

2. Institutions licensed by the board shall not use the words "state board of education" in any outdoor advertising or on the building itself.
3. The words "licensed by the state board of education" or any other allusion to state licensing,if included in any brochure, stationery, or printed advertisement of any nature, must be in print no larger than the smallest print used elsewhere in the material.

NAC 394.150

Are occupational permits required?

Yes, the Nevada Code states that

1. All noncertificated applicants, employees of an applicant, and persons who volunteer their services to an institution shall hold valid local occupational permits before beginning any activity at an institution. Any fees or costs associated with the local occupational permit, including, but not limited to, the cost of investigations by the Federal Bureau of Investigation, must be paid by the applicant, employee, or volunteer.
2. If the institution is located in a jurisdiction in which a memorandum of understanding [see below*]
   (a) Exists between the department and the local law enforcement agency, the local occupational permit must be obtained from that local law enforcement agency.
   (b) Does not exist, the local occupational permit must be obtained from the department and the superintendent of public instruction who shall conduct an investigation of the background of the applicant and any employee of the applicant or volunteer and submit fingerprints to the Federal Bureau of Investigation for its report before any permit is issued.
3. The applicant shall
   (a) Submit three local references attesting to the character and reputation of the owner or chairman of the board of trustees of the institution.
   (b) Notify the department in writing of the conviction of an officer or member of the staff of the institution of any crime or felony involving moral turpitude which could affect relationships with pupils.

4. An institution shall not knowingly employ any person who has been convicted of a crime involving moral turpitude with a minor unless otherwise [approved] by the board.

NAC 394.160

[*]The superintendent of public instruction may enter into a memorandum of understanding between the department and a local law enforcement agency specifying the particular procedures and conditions for the issuance of a local occupational permit for employees of an institution including:

1. The conduct of investigations of the background of the applicant, any employee of the applicant, and any person who volunteers his services to the institution; and
2. The submission of fingerprints to the Federal Bureau of Investigation for its report.

NAC 394.165

What other requirements exist regarding enrollment, race, and due process?

Applicants must:

1. State institutional policy and regulations on enrollment and entrance requirements. The policy and regulations shall be clearly stated in all literature.
2. File with the department a statement of assurance that students will be admitted to the institution without regard to race.
3. State institutional policy and regulations relating to student conduct or behavior and conditions for dismissal. Dismissal procedures must comply with requirements of due process law.

NAC 394.170

13.2 Exemption From Compulsory Attendance/ Home Schooling Requirements

What definitions does the Nevada Administrative Code rely upon regarding compulsory attendance at public schools?

Chapter 392, Section .011 of the Nevada Administrative Code provides the following definitions:

1. **Approved correspondence program** means a program provided by:
   - (a) A member of a national or regional accrediting association which is recognized by the United States Secretary of Education and accredited for elementary or secondary education;
   - (b) A public school in Nevada offering correspondence study at the elementary or secondary level, or both; or
   - (c) A private correspondence school which is licensed by the state board of education pursuant to the provisions of Chapter 394 of NRS.
2. **Consultation** means:
   - (a) Participation by the consultant in the preparation of the educational plan for the child;
   - (b) Participation by the consultant in the development or review of the subjects to be taught; and
   - (c) Consultation with the parent about any leaning problems which may occur.
3. **Educational progress** means the achievement by a particular child of academic skills that fall within an average range when compared to:
   - (a) Other children in the child's age group;
   - (b) Other children in the child's grade level; or
   - (c) The child's predicted ability as measured by a standardized test or any other method of evaluation which is appropriate for the child.

NAC 392.011

What instruction is required for children excused from compulsory attendance at a public school?

A child must be excused from compulsory attendance at public school when written evidence is provided to the board of trustees of the county school district that the child will receive equivalent instruction and be instructed by any one of the following:

1. By a teacher, other than the parent, who possesses a teaching license issued by the superintendent of public instruction for the grade level to be taught.
2. By the parent, when the parent qualifies for a teaching license for the grade level to be taught.

3. By the parent, in consultation with a person who
   (a) Possesses a teaching license issued by the superintendent of public instruction for the grade level to be taught; or
   (b) Has provided instruction in the home at the age level to be taught for at least three years.
4. By the parent when the child is enrolled in an approved correspondence program.

NAC 392.015

What information must a request for compulsory attendance excusal include?

1. The request to have a child excused from compulsory attendance at public school on the ground that the child will be given equivalent instruction outside the school must include
   (a) A statement about the person who will teach the child and where the instruction will take place;
   (b) A statement of the educational plan that includes:
      (1) The proposed educational goals for the child;
      (2) The methods of teaching; and
      (3) The instructional material to be used;
   (c) A calendar of the proposed days of teaching, including at least 180 days of instruction of appropriate length;
   (d) A schedule of a typical week of instruction, showing the subjects to be taught and the time to be allotted to each subject;
   (e) Evidence that:
      (1) The teacher, when he is other than the parent, has a license to teach issued by the superintendent of public instruction for the grade level to be taught;
      (2) The parent qualifies for a license to teach for the grade level to be taught;
      (3) The consultant has a license to teach issued by the superintendent of public instruction for the grade level to be taught or provided instruction in the home at the age level to be taught for at least three years;
      (4) The child is enrolled in an approved correspondence program; or
      (5) The parent has received a waiver; [see NAC 392.075]
   (f) Proof of the identity of the child, consisting of his birth certificate or some other document to establish his identity.
2. For the purposes of subsection 1 of NAC 392.015 [required instruction]

(a) For grades 9 to 12, inclusive, the teacher must have a license to teach secondary education with an endorsement in at least one of the following:
  (1) English.
  (2) Language arts.
  (3) Mathematics.
  (4) Social Studies.
  (5) Any of the physical or natural sciences.

(b) For grades 1 to 8, inclusive, the teacher must have a license to teach elementary education.

NAC 392.025

How long are instructional periods to last?

1. To constitute equivalent instruction, the instruction to be given a child outside the public schools must include instruction in the courses of study prescribed by the state board of education. [See NRS 385.110]
2. The minimum period of instruction which must be provided to the child on each day of instruction is the appropriate period specified in NAC 387.131.

NAC 392.035

A school district is not required to provide or compensate a teacher who possesses a teaching license issued by the superintendent of public instruction for the purposes of [instructing children excused from compulsory attendance].

NAC 392.055

How are exemptions renewed? Must they be renewed?

1. A grant of an excuse from compulsory attendance at public school is effective for one school year. A renewal of the grant of an excuse is conditioned upon continued compliance with required regulations. The board of trustees of the school district shall grant an excuse from compulsory attendance at public school for every school year for which the parent demonstrates compliance. [See NAC 392.011-075.]

NAC 392.065

What testing is required?

Except as otherwise provided in this section [392.065], proof of the educational progress of a pupil who is excused from compulsory attendance at public school must be submitted to the school district. Pupils in grades 2 to 8, inclusive, must be required to complete the appropriate level of the Comprehensive Test of Basic Skills, Fourth Edition. The test must be administered by the district or a person authorized to administer the test on behalf of the district.

If a child is a pupil with a disability and the tests required by this section are not appropriate for the child, an alternative test or other method of evaluation which is appropriate for the child must be used.

Any examination given pursuant to this section must be administered in the manner generally prescribed for examinations of this kind. The board of trustees of the district shall select or approve the administrator of the examination and the location where the examination is to be given, giving consideration to the recommendations of its staff and a representative of parents whose children are excused from attendance. [See NAC 392.011 to 392.075.]

A pupil who is enrolled in an approved correspondence program is excused from the requirement of being tested by the district . . . Educational progress for a pupil who is enrolled in an approved correspondence program must be determined by considering his grades, test results, or transcripts.

Educational progress for a pupil in grade 9, 10, 11, or 12, who is not enrolled in an approved correspondence program, must be determined by considering samples of his work from the subjects required in the secondary school course of study, standardized tests, or other measures agreed to by the parent and the board of trustees of the county school district.

As used in this section, "pupil with a disability" means any person under the age of 22 years who deviates either educationally, physically, socially, or emotionally so markedly from normal patterns that he cannot progress effectively in a regular school program and therefore needs special instruction or special services.

NAC 392.065 (Subsections 2-7)

What academic performance and remediation standards apply?

1. If, after at least nine months of education during which a pupil in grades 2 to 8, inclusive, is excused from compulsory attendance at public school, the pupil has a score on the "Total Mathematics," "Total Reading," or "Total Language" portion of the Comprehensive Test of Basic Skills, Fourth Edition, which is at or below the third stanine, a parent shall provide to the board of trustees of the school district information describing the remedial measures which the parent plans to pursue. The information regarding the planned remedial measures must accompany the next request to have the child excused from compulsory attendance which is submitted to the board of trustees.
2. In addition to the remedial information submitted . . ., the parent may submit to the board of trustees of the school district information regarding the prior performance of the pupil which demonstrates educational progress. The parent may also submit the results of any test which assesses the child's abilities or identifies any learning difficulties, any other applicable evaluation of the pupil, and any associated recommendations for remediation.

NAC 392.067

What if the remedial measures fail?

1. If, after at least nine months of incorporating remedial measures, the pupil's score on the "Total Mathematics," "Total Reading," or "Total Language" portion of the Comprehensive Test of Basic Skills, Fourth Edition, remains at or below the third stanine and the score has improved less than five percentile points, the board of trustees of the school district may require the parent to obtain assistance from a consultant in preparing revised remedial measures. The consultant must possess a teaching license issued by the superintendent of public instruction for the grade level to be taught. If no such consultant is available, upon the request of the parent, the staff of the school district may assist the parent in preparing the revised remedial measures.
2. In addition to the revised remedial measures submitted pursuant to subsection 1, the parent may submit to the board of trustees of the school district the results of any test which assesses the

child's abilities or identifies any learning difficulties, any other applicable evaluation of the pupil, and any associated recommendations for remediation.

NAC 392.069

How long must a parent employ a consultant?

1. The board of trustees of the school district may require a parent who, pursuant to NAC 392.069, obtained assistance from a consultant in preparing revised remedial measures to continue to obtain the assistance of a consultant after any school year in which the pupil's score on the "Total Mathematics," "Total Reading," or "Total Language" portion of the Comprehensive Test of Basic Skills, Fourth Edition, is at or below the third stanine and the pupil has improved less than five percentile points.
2. If a parent is required pursuant to this section to obtain the assistance of a consultant, the board of trustees shall waive the requirement after every school year in which the pupil demonstrates educational progress.

NAC 392.071

The board of trustees of a county school district must waive the requirement for a consultant after one year when it has been demonstrated that the child has made reasonable educational progress in his educational plan. The waiver will apply if other children in the family are excused at a later date from compulsory attendance of public school.

NAC 392.075

Chapter 14

School Buildings, Grounds, Equipment, and Transportation

14.1 School Buildings

What are the powers of the school trustees regarding school buildings?

1. The board of trustees of a school district may
   (a) Build, purchase, or rent schoolhouses and other school buildings, including but not limited to teacherages, gymnasiums and stadiums, and dormitories and dining halls as provided in NRS 393.090.
   (b) Change the location of schools.
   (c) Close a school or change the use of the school building to a purpose other than the teaching of kindergarten through 12th grade.
   (d) Supervise and inspect the work performed pursuant to a contract to which the provisions of NRS 393.110 apply.
2. Any board of trustees which proposes to change the location of a school, close a school or change the use of a school building as provided in subsection 1 shall give 30 days' written notice to the principal and teachers of the affected school and to the parents of the children attending that school. In addition the board shall publish a notice of the subject, time and place of the meeting at which the matter will be considered, in a newspaper of general circulation in the county at least 10 days before the meeting.

NRS 393.080

Must schools allow religious organizations to use their facilities when school is not in session?

No. School districts, like owners of private property, may legally preserve the property under its control for the use to which it is dedicated. However, when districts "open" the property for public use, they may not practice viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.* (1993), the Lamb's Chapel, a local evangelical church, planned to present a video series on family values and child development and requested the use of the local school district facilities.

The Center Moriches School District had adopted policy based on a New York state education law that permitted school boards to allow facility use for ten specific purposes including social, civic, recreational, and entertainment uses, but prohibited use by any group for religious purposes. The district refused the church's request, stating that "[t]his film does appear to be church related and therefore your request must be refused." The school district had, on several occasions, allowed other organizations (including a New Age religious group) to use their facilities for discussions of somewhat similar topics.

The Lamb's Chapel church sued and eventually prevailed before the U.S. Supreme Court which ruled that refusing to allow a church access to school property to show a film with a religious viewpoint, when the district allowed other organizations access for similar purposes, violated the Free Speech Clause of the First Amendment. The Court further noted that allowing the exhibition of such a film on public school premises did not run afoul of the Lemon test, since the screening would not occur during school hours, was not sponsored by the district (and would not be perceived by the public as an endorsement of religion), and was open to the public (not just the particular church congregation).

Following the landmark *Lamb's Chapel* case, the Nevada Attorney General issued an opinion which reiterated the Supreme Court edict:

> Nevada constitution (see Nev. Art. 11, §§ 2, 9 and 10) does not prohibit use of school facilities by sectarian groups for occasional worship services outside of normal school hours if board of trustees of school district has created limited public forum and cost associated with use is reimbursed to school district. However, board of trustees is not required to create limited public forum or permit sectarian activity. (See also NRS 393.071.)
>
> AGO 93-2 (3-16-1993)

What approvals are necessary before letting contracts for new school buildings or alterations to existing buildings?

Plans must be submitted and approved by the state public works board before the letting of contracts is allowed for the erection of new buildings or the structural alteration of existing buildings (NRS 393.110).

What recourse do district residents have if they wish to challenge the closing or use of a school?

1. Any resident of a school district who is aggrieved by a decision of the board of trustees to close of change the use of a school under NRS 393.080 may, within 30 days after the decision is rendered, make a written request to the board for a hearing for reconsideration of the decision. The board shall schedule the hearing within 30 after receiving the request and shall publish a notice of the time and place of the hearing in a newspaper of general circulation in the county at least 10 days before the hearing.
2. Any resident of the school district who is aggrieved by the decision of the board of trustees at the reconsideration hearing may, within 30 days after that decision is rendered, make a written request to the state board of education for a hearing to review the decision. The state board of education shall conduct the hearing in the county in which the school is located within 30 days after receiving the request and shall publish a notice of the time and place of the hearing in a newspaper of general circulation in the county at least 10 days before the hearing. The state board of education shall hear the matter de novo [anew]. The decision of the state board of education after its hearing is a final decision subject to judicial review as provided by law.

NRS 393.085

14.2 School Sites

May the board of trustees of a school district expend monies for the purchase, acquisition, lease and improvement of school lands?

Yes. The board of trustees has the power to "exchange, purchase, lease or otherwise to acquire any school site or other real property for necessary school purposes, including but not limited to playgrounds, athletic fields and sites for stadiums." The board may also expend monies for necessary improvements, including those off school premises but necessary to facilitate on-site construction such as drainage for flood control (NRS 393.140 and 155).

For more detailed information regarding the sale, lease or rental of real property belonging to a school district, see NRS 393.220-3293.

14.3 Equipment and Supplies

In Nevada who is responsible for the purchase of library books, textbooks and other school supplies?

The board of trustees is responsible to:

> purchase all new library books and supplies, all new textbooks and supplementary schoolbooks which are necessary and have been approved by the state board of education, and school supplies necessary to carry out the mandates of the school curriculum to be used by the pupils of the school district. The cost of the books and supplies is a legal charge against the school district fund. All books purchased by the board of trustees must be held as property of the school district, and must be loaned to the pupils of the school in the school district.

NRS 393.160 and 170 §§ 1, 2

Who is responsible for lost or damaged books, materials or equipment loaned to students?

Nevada law states that:

> The parents and guardians of pupils are responsible for all books and any and all other material or equipment loaned to the children in their charge, and shall pay to the clerk of the board of trustees, or to any other person authorized by the board to receive the same, the full purchase price of all such books, material or equipment destroyed, lost or so damaged as to make them unfit for use by other pupils succeeding to their classes. The board of trustees shall establish reasonable rules and regulations governing the care and custody of such school property, and for the payment of fines for damage thereto.

NRS 393.170 § 3

14.4 Transportation

Must school districts furnish transportation for pupils?

Trustees "may" provide pupil transportation for regular education students. NRS 392.300 provides:

> 1. As provided in this Title, the board of trustees of any school district may furnish transportation for all resident children of school age in the school district attending a public school, including pupils assigned to special schools or programs pursuant to NRS 388.440 to 388.520, inclusive:
>   (a) Who are not excused form school attendance by the provisions of this Title; and
>   (b) Who reside within the school district at such a distance from the school as to make transportation necessary and desirable.
> 2. When the board of trustees of a school district whose population is less than 100,000 furnishes transportation for pupils attending public schools pursuant to subsection 1, the board may also provide transportation for all resident children of school age in the school district attending private schools not operated for profit, over bus routes established for pupils attending public schools. If such transportation is provided, the pupils attending such private schools must be transported, if space is available, to and from the points on the established routes nearest to the schools which they attend.
> 3. The board of trustees of any school district may;
>   (a) Establish bus routes.
>   (b) Make regulations governing the conduct of pupils while being transported.
>   (c) For the safety of pupils being transported, govern the conduct of drivers by making and enforcing regulations not inconsistent with regulations of the state board of education or with law.
>
> NRS 392.300

The federal Individuals with Disabilities Education Act (IDEA) requires special education students to be provided with transportation if such transportation is needed for them to benefit from the school's special education program. This requirement is termed a "related service" and was added to the Nevada Administrative Code in 1988. The following is the federal definition of related services:

34 CFR § 300.16 Related Services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

NAC 388.101

May district trustees reimburse parents for pupil transportation?

Yes, NRS 392.350 states that:

1. When the daily transportation of a pupil is not practical or economical, the board of trustees, in lieu of furnishing transportation, may pay to the parents or guardian of the pupil an amount of money not to exceed $10 per day of attendance at school to assist the parents or guardian in defraying the cost of board, lodging and other subsistence expenses of the pupil to attend a public school in a city or town in this state or in an adjoining state. If the public school is in an adjoining county or state, costs for tuition and subsistence must be fixed by agreement between the boards of trustees of the school district in which the pupil resides and the school district in which the pupil attends school.
2. Payment of money in lieu of furnishing transportation may be made only if:
    - (a) The guardian or parents have been residents in the area for a period set by the board of trustees; and
    - (b) The superintendent of public instruction determines that the arrangements comply with regulations of the state board of education.

What limitations and driver restrictions apply to pupil transportation?

School buses and vehicles belonging to the school district may only be used for transporting pupils to and from "interscholastic contests, school festivals and other activities properly a part of a school program." Districts must furnish "proper supervision" and qualified drivers.

School bus drivers cannot operate a school vehicle for more than 10 hours in a 15-hour period, and "the time spent operating, inspecting, loading, unloading, repairing and servicing the vehicle and waiting for passengers must be included in determining the 15-hour period." After 10 hours of operation a driver must rest for 10 hours before operating such a vehicle is resumed. Activities such as transportation to a Red Cross summer swimming program sponsored by the PTA have been found to be properly related to the school program (NRS 392.360).

How are districts to address bus safety?

NRS 392.375 as amended by AB 205 (1997) required each school district to adopt a school bus safety program in which all pupils enrolled in preschool, kindergarten, and grades one to four who ride a school bus must participate at least annually. The safety program required school districts to instruct all pupils in the responsibility of school bus passengers to use the emergency doors during an evacuation. Such instruction must be provided at least twice each school year.

The law also required schools to provide, at the time of enrollment, the parents or guardians of children enrolled in preschool, kindergarten, or grades one through six with written information concerning the safety of pupils on school buses if such students will be riding a school bus for the first time.

Finally, the law required each school district board of trustees to adopt regulations for pupil participation in school bus safety programs and for participation in such programs at the beginning of each field trip.

Adapted from the Bill Summary, Assembly Bill 205, prepared by the Legislative Counsel Bureau, Research Division, 1997.

What are the qualifications for drivers of school vehicles?

NRS 392.380 mandates these qualifications for drivers:

1. No person may be employed by a board of trustees of a school district as a driver of a school bus, station wagon, automobile or other motor vehicle, or mechanically or self-propelled vehicle of any kind which transports pupils to and from school or any other place in connection with school activities unless:
   - (a) He is of good, reputable and sober character.
   - (b) He is competent and qualified by experience and disposition to operate the particular type of vehicle in a safe and dependable manner.
   - (c) He is licensed under the laws of this state to operate the particular type of vehicle.
2. Each driver of a school bus or a bus used to transport pupils for extracurricular activities must complete a training course approved by the state board of education which includes at least 10 hours of training while operating the vehicle, and 10 hours of training in
   - (a) The responsibilities of drivers;
   - (b) The requirements for drivers of school vehicles;
   - (c) The laws affecting the operation of a school bus or a vehicle belonging to a school district;
   - (d) Defensive driving;
   - (e) Emergency procedures; and
   - (f) First aid.
3. Each driver must pass a written test each year approved by the superintendent of public instruction and administered by the local school district.
4. A board of trustees may employ a pupil attending a school under the supervision of the board as a driver when he possesses the qualifications stated in subsection 1 and his guardian or parents first consent to his employment. The board of trustees may arrange or contract, in writing, with the pupil, and with his parents or guardian if he is under the age of 18 years, for his services as a driver upon such terms, conditions and provisions and for such compensation as the board deems most economical and for the best interests of the school district, pupils and other persons.

NRS 392.380 §§ 1-4

What specification and inspection requirements apply to school transportation vehicles?

All school transportation vehicles must be in good condition, must be well equipped and have "a seat inside the vehicle" for each pupil being transported. The law requires that each pupil remain seated when the vehicle is in motion.

Vehicles are to be inspected semiannually by the depabtment of motor vehicles and public safety which is required to submit written recommendations to the superintendent of schools of the district regarding vehicle defects. Failure by a superintendent to take appropriate action to correct defects within 10 days of receipt of written notice is a misdemeanor, conviction of which may result in his or her removal from office (NRS 392.400).

14.5 Public Purchasing/Public Works

What are the general requirements of competitive bidding?

NRS Chapter 332 outlines the general requirements for public purchasing. Generally, for counties whose population is less than 100,000 advertising is required if estimated contract amount exceeds $10,000; requests for bids required if estimated contract amount exceeds $5,000 (NRS 332.035). For counties whose population exceeds 100,000 advertising is required if estimated contract amount exceeds $25,000; requests for bids required if estimated contract amount exceeds $10,000 (NRS 332.039).

What is required for advertised bids?

The published notice must be published at least once and not less than 7 days before the opining of bids (NRS 332.045). The notice must state:

(a) The nature, character or object of the contract.
(b) If plans an specifications are included, where the plans and specifications may be viewed.
(c) The time and place where bids will be received and opened.
(d) Other matters pertaining to the bid.

Are there exceptions to the requirement for competitive bidding?

Yes. Contracts for sole source products, professional services, insurance, software for computers, books, library materials and subscriptions (NRS 332.115).

Is there a requirement for competitive bidding if no responsible bids are received?

No. When the governing body or its authorized representative has advertised for or requested bids and no responsible bids are received the governing body may let the contract without competitive bidding not less than 7 days after it publishes a notice stating that no responsible bids were received on the contract and that the contract may be let without further bidding. The governing body must entertain any bid which is submitted after it publishes notice and before expiration of the 7 day waiting period (NRS 332.148).

May a school board member or authorized representative of the school district be interested in a contract in which the district is a party?

No. A violation of NRS 332.155 is a misdemeanor and cause for removal from office.

What is the effect of collusion between bidders or advance disclosures?

The contract is void where there was collusion between bidders or where advance disclosure of any information to a particular bidder gave that bidder any advantage over other bidders in advance of opening of bids.

What is a public work under Nevada law?

A public work is any project for the new construction, repair or reconstruction of public buildings whose cost as a whole exceeds $20,000 (NRS 338.010(5)). Each separate unit which is a part of a project is included in the cost of the project for the purpose of determining whether a project meets the $20,000 threshold.

What wages must be paid for the construction of public works?

The "prevailing wage" for the political subdivision as determined by the Nevada Labor Commissioner for all public works whose cost exceeds $100,000 (NRS 338.020; 338.080). A unit of the project must not be separated from the total project, even if that unit is to be completed at a later time, in order to lower the cost of the "total" project below $100,000.

Can there be preferences for certain contractors in letting contracts for public works?

Yes. Where the qualifications of contractors are otherwise equal, preference shall be given first to honorably discharged members of the armed forces who are citizens of the state of Nevada and second to other citizens of Nevada.

Appendix A

Understanding Law Reporter Citations

Title and Name of Cases

Smith	v.	*Jones*
plaintiff (or petitioner)		defendant (or respondent)
appellant (or petitioner)		appellee (or respondent)

Plaintiff and defendant names usually remain in original order when appealed, however, in some states the order is reversed.

United States Court System

U.S. Supreme Court

406 U.S. 205	Official Government Reporter (Government Printing Office since 1790)
92 S. Ct. 1526	West Reporter
32 L.Ed.2d 15	Lawyers Co-operative Reporter

The United States Courts of Appeals (Or Circuit Courts)

27 F.3d 1373 (9th Cir. 1994) West's Federal Reporter since 1880. Ninth Circuit Court of Appeals is in San Francisco and covers the states of Washington,Oregon, Idaho, Montana, Nevada, California, Arizona, Alaska, Hawaii, and Guam (see map of the 13 Federal Judicial Circuits).

United States District Courts

450 F. Supp. 742 (D. N.J. 1977) West's Federal Supplement since 1924. Federal trial court jurisdiction, e.g., constitutionally based issues. Abbreviations in parentheses denotes original jurisdiction of case, District Court of New Jersey.

State Court Decisions and West's National Reporter (or Digest) System

West's National Reporters

The West Company publishes selected state (and D.C.) appellate cases and nearly all written state supreme court decisions. West divides the fifty states and the District of Columbia into seven national regions. They are listed below, preceded by spine abbreviations and followed by state coverage.

P	Pacific:	AK, AZ, CA, CO, HI, ID, KS, MT, NV, NM,OK, OR, UT, WA, WY.
NW	North Western:	IA, MI, MN, NE, ND, SD, WI.
SW	South Western:	AR, KY, MO, TN , TX.
NE	North Eastern:	IL, IN, MA, NY, OH.
A	Atlantic:	CT, DE, DC, ME, MD, NH, NJ, PA, RI, VT.
SE	South Eastern:	GA, NC, SC, VA, WV.
SO	Southern:	AL, FL, LA, MS.

Examples of National Reporter System Citations:

705 P.2d 640 537 A.2d 1227

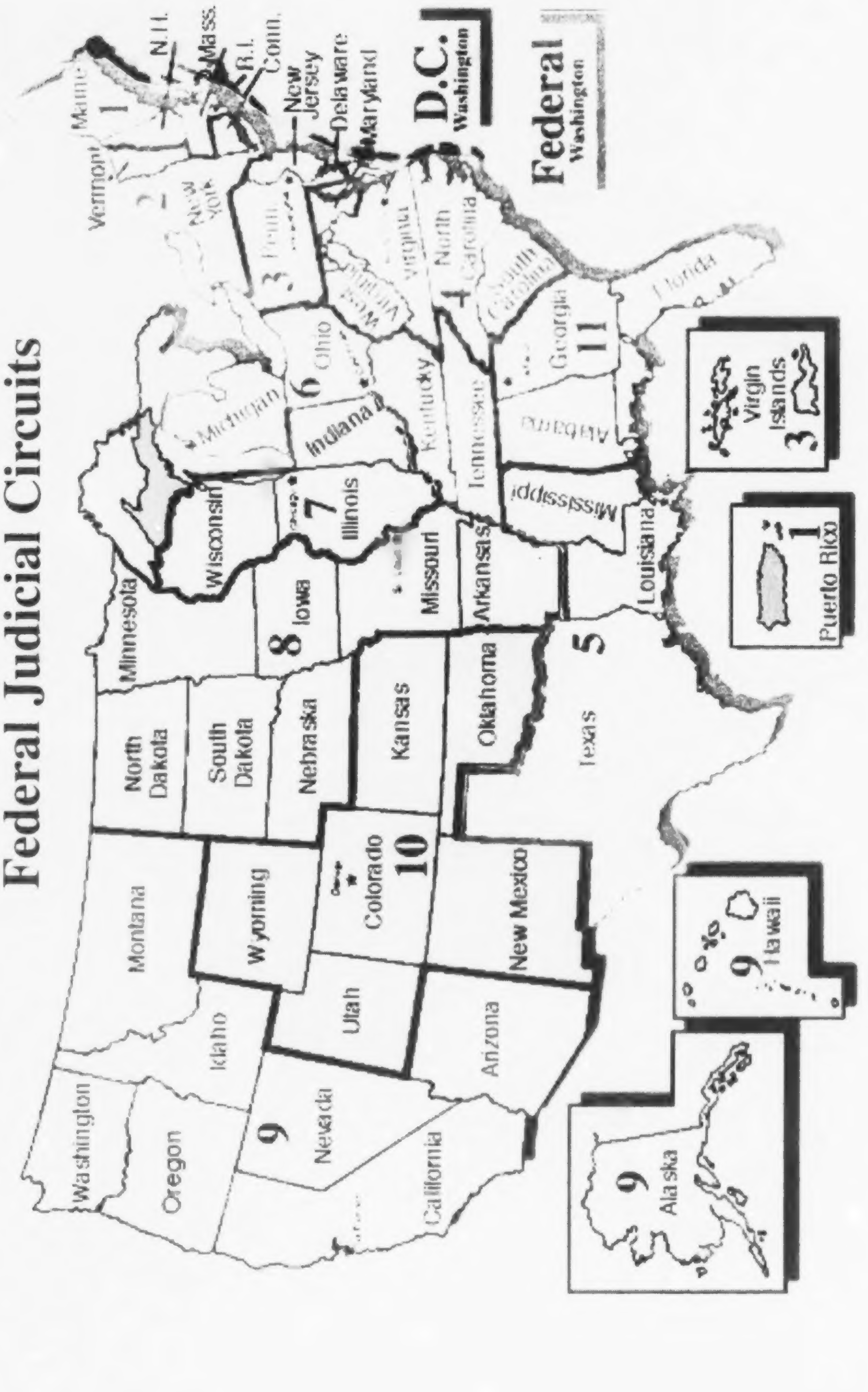
Parallel Citations

About half of the states still publish their own "official" reporters (e.g., CA and NV), while others rely solely on the West system. When researching a case originating from a state that has its own system, and West has also cited the case, you will find parallel citations.

Examples of Parallel Citations:

101 Nev. 372, 705 P.2d 640
109 N.J. 396, 537 A.2d 1227

Federal Judicial Circuits



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Appendix B

Key Constitutional Amendments and Civil Rights Statutes

I. Frequently Cited Constitutional Amendments

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

II. Major Federal Civil Rights Statutes

42 USC § 1983—The Civil Rights Act of 1871

Section 1983 provides

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC § 2000(d)—Civil Rights Act of 1964, Title VI

Section 601 of Title VI provides

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 USC § 2000(e)—Civil Rights Act of 1964, Title VII

Section 703(a) provides in part that

> It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

20 USC § 1681—Education Amendments of 1972, Title IX

Section 901 of Title IX provides in part

> § 901 (a) No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

29 USC § 794—Rehabilitation Act of 1973, § 504

The Act, in its revised language, provides in part

> To otherwise qualified person with a disability ... shall ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Appendix C

Judicial and Legislative Influences on Education

Federal
United States Court System
U.S. Supreme Court
U.S. Court of Appeals (Nevada in Ninth Circuit)
U.S. District Court (District of Nevada, offices - northern and southern Nevada, 4 judges)

U.S. Constitution/Amendments
Civil Rights Acts
    e.g., Sexual Harassment (CRA of 1964, Title VII, also cited in CFR 300)
Title IX of Education Amendments of 1972
EEOC (Equal Employment Opportunity Commission), e.g, enforces Title VII.
OCR (Office for Civil Rights), e.g., enforces Title IX. Seattle office covers six western states, including Nevada.
Federal Statutes
    IDEA
    ADA
    Section 504 (of Rehabilitation Act of 1973)
Federal Codes
U.S. DOE Regulations
OSEP Policy Letters

State
Nevada Supreme Court (5 justices)
Nevada District Courts (9 districts; e.g., Clark County is District 8)
    (e.g., PPST decision in Las Vegas)
AGO (Attorney General Opinion)
State Statute, NRS (from state legislature)

NDOE (Policies/Internal Policies)
  e.g., Equity Division
  Hearing Officer Opinions
  State Review Rulings
Commission on Professional Standards in Education (the "Standards Commission")
Nevada Administrative Code (NAC)
District School Board Policies

Appendix D

Significant Legal Decisions Interpreting Section 504

Southeastern Community College v. Davis, 442 U.S. 397 (1979)

This seminal U.S. Supreme Court decision held that a college did not discriminate against a student with a serious hearing impairment when it denied her admission to its nursing program. The Court concluded that the student was not "otherwise qualified" because she could not effectively participate in clinical courses without individualized supervision by an instructor. Such supervision and/or lowering of program requirements to allow access go beyond the "reasonable accommodation" requirements of Section 504.

Pushkin v. Regents of the University of Colorado,
658 F.2d 1372 (10th Cir. 1981)

The Tenth Circuit reversed a medical school's denial of admission to an applicant solely because he had multiple sclerosis. The court found that the college's admissions committee focused almost entirely on the student's disability and made incorrect assumptions about multiple sclerosis without any particularized knowledge pertaining to the student.

Doe v. New York University, 666 F.2d 761 (2d Cir. 1981)

The court held that a medical school did not discriminate by denying readmission to a student who had a history of mental illness which put herself and others at risk. The court held that an institution is not required to disregard reasonable precautions or requirements which it normally imposes to ensure safe participation.

Doherty v. Southern College of Optometry,
863 F.2d 570 (6th Cir. 1988)

This court ruled that a student who has an eye disease which affected his motor skills, sense of touch and manual coordination was not "otherwise qualified" to participate in the school of optometry because he could not perform certain clinical requirements of the optometry program. Like the Court in *Davis*, the *Doherty* court held that a college may require reasonable physical requirements if they are deemed necessary. Moreover, a college is not required to accommodate a student by eliminating course requirements which are *reasonably necessary* for proper use of the degree sought.

United States v. Board of Trustees of the University of Alabama,
908 F.2d 740 (11th Cir. 1990)

The court found the university in violation of Section 504 when it imposed a requirement upon students with hearing impairments to be low-income in order to qualify for interpreter services. Otherwise, the student would be financially responsible for such services. The court ruled that even if the Department of Vocational Rehabilitation refused to provide services to students based on their income, the university could not deny such services.

The court also ruled that the university's transportation system violated the rights of students with mobility impairments. The university had a limited number of buses that were accessible to students/employees who used wheelchairs. Unlike other buses, the accessible buses had limited runs and any other time services were needed, students were required to make special arrangements in advance. The court specifically rejected the university's contention that providing such services would not be a reasonable accommodation due to the cost involved.

Nathanson v. The Medical College of Pennsylvania,
926 F.2d 1368 (3d Cir. 1991)

In this case, a woman who had applied for and been accepted as a medical student sued the college for damages alleging that the college failed to make reasonable accommodations for her disability. The student had been in a car accident and suffered neck and back injuries. Although she began school, she found that she could not continue attending because of seating problems. The student attended a series of meetings and corresponded with various school officials in which her injury was discussed.

The court held that the case must be remanded for trial for a determination as to whether the college (1) "knew or had reason to know" that the student had a disability; (2) if so, did the college attempt to make reasonable accommodations; (3) if not, would the necessary accommodations have placed an undue burden upon the college. The court held that under Section 504, a college's obligation to students with disabilities goes beyond merely making buildings and facilities accessible. However, the college must be given adequate time to make needed accommodations.

Wynne v. Tufts University School of Medicine,
932 F.2d 19 (1st Cir. 1991)

The First Circuit reversed a lower court and remanded this case for trial on the issue of whether the university discriminated against a student with dyslexia by dismissing him after he failed several courses during two attempts to complete the first year program. The student claimed that the university was required to accommodate his disability by testing him other than by multiple choice examination. In noting that the student received much higher scores on "practicum" examinations the court found that the university provided no evidence that multiple choice exams provided a superior method for measuring the student's ability to "assimilate, interpret and analyze complex written material."

Doe v. Washington University,
780 F. Supp. 628 (ED Mo. 1991)

A former dental student sued the university for damages for failing to allow him to continue in the university's clinical program because he tested positive with the HIV virus. The court dismissed the case, ruling that the student was not "otherwise qualified" under Section 504. Moreover, the court held that the decision to disenroll the student was wholly "academic" and not medical, and therefore the court should defer to the university"s decision, absent an abuse of discretion. Finally, the court held that the university, in denying the student participation in its clinical program, was applying a reasonable physical qualification to participate.

Appendix E

Legal Terms and Phrases

1.	injunction	court order to compel or stop an act
2.	mandamus	court order to make public official perform duty (like enforce existing law)
3.	tenure	right to employment for continuing period of time
4.	certiorari	remove case from lower to higher court
5.	plaintiff	one who files complaint or action in court
6.	defendant	the person defending or denying
7.	appellant	one who takes appeal to higher court
8.	appellee	party against whom appeal is sought (respondent)
9.	summary judgment	following a motion and prior to trial, judge may rule that there is no genuine issue of material fact (rule of civil procedure 56)
10.	prima facie	enough evidence to have or support a case; evidence necessary to require defendant to proceed with his/her case; prima facie evidence may be opening claims or presumptions that will prevail if not rebutted or disproved
11.	remand	send back to lower court (from which it came)
12.	en banc	in the bench; all judges participate in decision (if 3 in district, all 3 participate)
13.	mitigate damages	lessen amount of damages

14. amicus curiae	"friend of the court" (briefs) must show how outcome of case will effect you or your group
15. double jeopardy	criminal law term; does not apply to K-12 students; students may be arrested and penalized by police, and punished by school officials
16. malfeasance	do an act you should not do (unlawful)
17. misfeasance	lawful act but improperly done
18. nonfeasance	omission of act one ought to do
19. de jure	as a matter of law
20. de novo	new trial
21. de minimis	too minor to require "due process" or unworthy of judicial attention
22. curia	a court
23. per curium	all justices agree (usually unsigned, unanimous opinion)
24. in loco parentis	in the place of the parent
25. ibid	in the same place
26. infra	below, usually referring to a later text or citation
27. supra	see citation above, or an earlier reference
28. et al	and others
29. dicta	remarks in court opinion not essential to decision; not binding
30. in re	in the matter of, concerning, regarding
31. inter alia	among other things

32. stare decisis	the basis of relying on previous decisions (precedents)
33. motion	request for a court ruling
34. abridge	to shorten; in law, to interfere with
35. class action	suit brought on behalf of a large class of individuals by one or more members of that class or group (have legal standing)
36. color of law	under the appearance of legal authority
37. complaint	the pleading by a party instituting a law suit; includes a request for relief
38. enjoin	to order action (by court order); abstain, desist or perform an action
39. respondent	the party answering a complaint or petition
40. pro bono	represent free of charge
41. libel	defamation by printed or written communication
42. slander	defamation by spoken word
43. prayer	request for relief
44. dictum	the expression by a judge of an opinion on a point of law—not necessary to the decision on the case and not binding on other judges

Appendix F

Index of Legal Authorities

Case Law

Abington Township v. Schempp, 374 U.S. 203 (1963)
Agostini v. Felton, 117 S.Ct. 1997 (1997)
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Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)
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Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995)
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Doe v. New York University, 666 F.2d 761 (2d Cir. 1981)
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Doe v. Washington University, 780 F. Supp. 628 (ED Mo. 1991)
Doherty v. Southern College of Optometry, 863 F.2d 570 (6th Cir. 1988)
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Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988)
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Nathanson v. The Medical College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991)
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13	*Las Vegas Fed. of Teachers vs. Clark Cty. Sch. Dist.* (1974)
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17	*Glenn vs. Ormsby County Teachers Assn.* (1974)
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21	*IAFF vs. City of Las Vegas* (1974)
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28	*Ormsby Cty. Class. Teachers Assn. vs. Carson City Sch. Dist.* (1975)
30	*Douglas Cty. Prof. Ed. Assn. vs. Douglas Cty. Sch. Dist.* (1975)
33	*Glenn vs. Ormsby County Teachers Assn.* (1975)
36	*White Pine Assn. of Class. Teachers vs. White Pine Sch. Dist.* (1975)
42	*City of Sparks* (1975)
43	*IAFF Local 1908 vs. Clark County* (1975)
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56	*Washoe Cty. Teachers Assn. vs. Washoe Cty. Sch. Dist.* (1976)
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